SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 247.

RICHARD CRAWFORD AND EDWARD A. VALENTINE, PLAINTIFFS IN ERROR,

vs.

JOHN E. BURKE, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This is a suit in tort brought by the defendant in error against the plaintiffs in error to recover damages sustained by him by reason of the positive frauds committed by them, and by reason of their willful and malicious injuries to his reversionary interests in certain shares of Metropolitan Traction stock, as alleged in the declaration.

In each of the first five counts of the declaration it is alleged that the defendants, under the firm name of Crawford & Valentine, were stock brokers and dealers in investment securities; that the plaintiff employed the defendants,

as his brokers and agents, to buy, hold, and carry stocks for him, subject to his order; that the defendants, as his brokers and agents, had in their possession or under their control and belonging to him a certain specified number of shares of the capital stock of the Metropolitan Traction Company, which they held as a pledge and as security for the amount due them from the plaintiff on said stock; that the defendants wrongfully, willfully, and fraudulently, and without his knowledge or consent, sold said shares of stock, and willfully and fraudulently, and *with intent to cheat and defraud* the plaintiff, converted said stock and the plaintiff's reversionary interests therein to their own use, by means whereof the plaintiff's reversionary interests in said stock were wholly lost to him.

In each of the last five counts of the declaration it is alleged that after the defendants had wrongfully and fraudulently, and without his knowledge or consent, sold the plaintiff's stock and had converted the proceeds of the sales to their own use, they falsely and fraudulently represented to him that they still had the stock on hand, and were still holding and carrying it for him; that their correspondents at Philadelphia, where the stock had been bought, were then and there calling upon them for further payments or margins on the stock, and that therefore it was necessary for them, the defendants, to call upon the plaintiff to make further payments on the stock in order that they might comply with the demands of their correspondents, and be secured against loss. It is alleged in each of said counts that the aforesaid representations were false and fraudulent, and that, by means of said false and fraudulent representations, the defendants obtained from the plaintiff several large sums of money, amounting in the aggregate to the sum of $10,800.

A suit, involving the transaction in controversy in this case, was brought in 1895, shortly after the failure of plaintiffs in error. The declaration was substantially the same

as the declaration in the present suit. The defendants filed pleas of "Not guilty." The cause came on for trial in 1897, and was tried by the court without a jury, a jury trial having been waived by both parties in open court. An abstract of the evidence, and briefs on each side, were submitted to the court, at its suggestion, and the case was taken under advisement. After counsel of both parties were notified that the court was ready to announce its decision, counsel for plaintiff requested the defendants' counsel, in open court, to file, *in writing*, their waiver of a jury in order that the plaintiff, in case the judgment should be in his favor, might have the benefit of the provisions of the statute with reference to the waiver of a jury. This, the defendants' counsel refused to do. Thereupon the plaintiff withdrew his suit, and on July 20, 1897, immediately after the withdrawal of the suit, commenced the present suit. The defendants pleaded "Not guilty." Issue was joined January 4, 1898 (Rec., 25). A jury was waived, in writing, May 12, 1900 (Rec., 28). The trial commenced on January 3, 1901, and after the opening statements had been made by counsel the defendants filed their separate pleas *puis darrein continuance*, setting up their discharge in bankruptcy as a defense, and also, in the same pleas, alleging that the plaintiff's claims were provable and were not excepted from the operation of their discharge. The plaintiff replied, denying that the claims in controversy were provable, and also denying that they were not excepted from the operation of the defendants' discharge (Rec., 32, 33).

Notwithstanding the plea of *puis darrein continuance*, the plaintiff introduced evidence and proved the allegations in his declaration, and the amount of damages which he had sustained.

The defendants were found "guilty" on each and all of the counts in the declaration, and judgment was entered against them (Rec., 34), as follows:

"This day again come the parties to this suit by their attorneys respectively and the court now here, after hearing all the evidence adduced, and being fully advised in the premises, finds the defendants Richard C. Crawford and Edward A. Valentine guilty, and assesses the plaintiff's damages to the sum of nine thousand and six hundred ninety dollars and twenty-one cents.

"Therefore it is considered by the court that the plaintiff do have and recover of and form the defendants Richard C. Crawford and Edward A. Valentine, his said damages of nine thousand six hundred ninety dollars and twenty-one cents ($9,690.21) in form as aforesaid by the court assessed together with his costs and charges in this behalf expended and have execution therefor.

"Thereupon the defendants having entered their exceptions herein pray an appeal from the judgment of this court to the appellate court in and for the first district of Illinois which is allowed upon said defendants filing herein their appeal bond in the penal sum of fifteen thousand dollars to be approved by the court together with their bill of exceptions within thirty days from this date."

In the appellate court, it appearing that one of the justices had taken part in the trial of the case below, and that the two remaining justices were unable to agree on the case, the judgment of the circuit court was affirmed (Rec., 254). The appellate court in its opinion filed in the case (201 Ill. App., 569) said:

"Many of the questions thus involved are important and not easy of decision."

The judgment of the appellate court was affirmed by the supreme court of Illinois on the appeal taken by the defendants (Rec., 261). The opinion of the supreme court will be found in the record at page 265.

ARGUMENT.

In a brief of 119 pages counsel for plaintiffs in error devote 25 pages to an argument on the Federal question now before this court, and which is the only question that the court can decide in the case at bar. The rest of their brief is given over to a rambling discussion of questions of fact, and to an argument on various legal questions, of which this court cannot take cognizance. Counsel call their discursive and vituperative harangue on a variety of questions of fact, an "argumentative statement." It cannot be that counsel have given so much time to a discussion of questions of fact simply for the purpose of giving expression to the malice and vindictiveness which their clients have shown since the commencement of these proceedings against them; and yet, it is somewhat difficult to see what other purpose it could serve, in view of counsel's admission that they do not urge a review of the facts "in expectation that this court will depart from its established procedure." Counsel's "argumentative statement" is substantially the same as that made in the courts below, and it is again repeated here. In the lower courts we thoroughly discussed all the questions of fact which were involved in the case. They are settled; and it would be a waste of time for us to discuss them in this court.

The main facts, on which the trial court found the defendants guilty, are set forth in the declaration. The facts so stated, and the facts which were hypothetically stated in the propositions of law submitted by plaintiff to the trial court, were proved at the trial, together with many evidentiary facts which tended to show the moral turpitude of the defendants. The affirmance of the judgment of the trial court by the appellate court settled the facts against the defendants.

The supreme court affirmed the judgment of the appellate court. In the opinion, the court said:

"The judgment of the appellate court is as conclusive upon all controverted questions of fact in this case as in any other, notwithstanding the recitals in the judgment of affirmance showing the disagreement between the two judges who considered the case in that court. The statute made no exception of such a case. We must regard all questions of fact as settled against appellants, and this includes all inferences of fact arising from facts actually proved (Rec., 269). * * * There was sufficient evidence for the court to find the facts as they were hypothetically stated in the plaintiff's propositions and also substantially as they were alleged in the declaration (Rec., 267). * * * The law undoubtedly is, and all the authorities so hold, that the fraud must be fraud in fact and not merely fraud implied by law. It must be positive fraud involving moral turpitude. It seems clear, however, that the declaration in this case sufficiently charges the *male fides* of the defendants in the transaction, setting forth their wrongful and fraudulent acts, and that such acts were done with intent to cheat and defraud the plaintiff; and there can be no doubt that the evidence is legally sufficient to support the declaration" (Rec., 269).

In each count of the declaration the defendants are charged with having committed a certain act, therein specified, with intent to cheat and defraud the plaintiff. An allegation of an intent to cheat and defraud is an allegation of fact. An allegation that an act was committed with intent to cheat and defraud is an averment of positive fraud involving moral turpitude. The trial court found that the allegations in the plaintiff's declaration were true.

The judgment of the court recites that "the court now here, after hearing all the evidence adduced, and being fully advised in the premises, finds the defendants Richard C. Crawford and Edward A. Valentine, guilty." The judgment of the court covered each and all the counts in the declaration. On each and every count the defendants were found guilty of having committed the act, therein specifically

set forth, with intent to cheat and defraud the plaintiff. The defendants were thereby adjudged to have committed positive fraud involving moral turpitude.

This court has repeatedly said that it could not review the facts on a writ of error to a State court. In Jenkins *vs.* Bull, 206 U. S., 280, Mr. Justice Brewer, delivering the opinion of the court, said:

"It is well settled that the findings of fact in the State courts are, on a writ of error conclusive with us (Hairston *v.* Atchison, &c., Railroad, 207 U. S., 673, 677, and cases cited therein; Bement *v.* National Harrow Co., *ante*, 70). In other words we apply the law to the facts settled in the State courts, and we do not search the record to see if there is not disclosed by the testimony some other matters not embraced in the findings which may affect the conclusion."

The trial court held certain propositions as law in the case (Rec., 236–245). The principles of law embodied in the propositions were applied by the court in rendering its judgment. The court found that the plaintiff's claims for damages were created by the defendants' fraud, involving moral turpitude, and held that they were excepted from the operation of defendants' discharge in bankruptcy. The affirmance of the judgment by the appellate court settled the facts, including the fact that the defendants had committed the several acts charged in the several counts in the declaration, *with intent to cheat and defraud the plaintiff.* That left for the courts of review the single question whether the law had been properly applied to the facts found. The supreme court of the State held that it had. That question is a Federal question, and it is now before this court for decision. The question is simply this:

Does a discharge in bankruptcy release a bankrupt from claims for unliquidated damages arising from or created by his positive fraud involving moral turpitude, while not acting as an officer, or as a trustee of an express trust, at the time he committed the fraud? That question involves an

opposing counsel admit, the construction of sections 17 and 63 of the bankruptcy act of 1898. The question as to the construction of section 63 comes first in order.

I.

The claims of defendant in error were claims for unliquidated damages arising out of torts; they were claims for damages occasioned by positive fraud; they were not provable in bankruptcy, and therefore were not barred by the discharge of plaintiffs in error.

For the purpose of comparison, we quote the provisions of the act of 1898 and the corresponding provisions of the act of 1867, relating to "Debts which may be proved."

Act of 1867.

Section 19 (Revised Statutes, section 5067): "That all debts due and payable by the bankrupt at the time of the adjudication of bankruptcy, and all debts then existing but not payable until a future day. * * * may be proved against the estate of a bankrupt."

"All demands against the bankrupt for or on account of any goods or chattels wrongfully taken, converted or withheld by him may be proved and allowed as debts to the amount of the value of the property so taken or withheld, with interest." * * *

"If any bankrupt shall be liable for unliquidated damages arising out of any contract or promise, or on account of any goods or chattels wrongfully taken, converted or withheld, the court may cause such damages to be assessed in such mode as it may deem best, and the sum so assessed may be proved against the estate. No debts other than those above specified shall be proved or allowed against the estate."

Section 33 (Revised Statutes, 5117): "That no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary

character, shall be discharged under this act; but the debt may be proved, and the dividend thereon shall be a payment on account of said debt."

ACT OF 1898.

"SEC. 63. DEBTS WHICH MAY BE PROVED.—(*a*) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date, or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract, express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments.

"(*b*.) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

With reference to the proof of debts under the provisions of the act of 1898, we say:

1. That paragraph *a* of section 63 classifies all claims or "debts which may be proved," while paragraph *b* provides for the precedent liquidation of such unliquidated claims only as come within the provisions of paragraph *a*, and, thereafter, for the proof and allowance of such claims.

2. That claims for unliquidated damages arising out of torts do not come within any of the provisions of paragraph *a*, and hence are not provable.

At first there was some doubt as to the scope of paragraph *b*, as will be seen from the following quotation from the third edition of Collier on Bankruptcy, published in 1900. At page 385, the author says:

"Whether, indeed, this new provision in paragraph '*b*' of the present statute is intended to permit the proving of claims in contradistinction to or in addition to the debts mentioned in the various subdivisions in paragraph '*a*' of the section, or whether, on the other hand, it is a mere rule of procedure, enacted for the purpose of defining the mode in which the amount of certain debts, the right to prove which is given by paragraph (*a*) shall be ascertained, is not altogether free from question.

"The language of paragraph '*b*,' *taken by itself*, is broad enough to justify the conclusion that Congress intended to allow claims arising out of torts as well as out of contracts to be proved. But as we have seen under the preceding paragraph as to judgments obtained after the petition is filed the general tendency is to hold that the debt retains its original status and character and is not merged in the judgment. Consequently, it is difficult to believe, if the rule laid down in the preceding paragraph is correct, that there was any intention by Congress to include any debts under paragraph '*b*' which could not be provable by the operation of paragraph '*a*.' (5.) The specific cases of torts which might be proved under the act of 1867, to wit: conversion, etc., of property, are probably still provable *if the tort be abandoned and the action be brought as upon an implied contract.* But as to the mere torts arising out of the injuries to persons and the like, the construction of paragraph '*b*,' which would allow such claims to be liquidated subsequently to the filing of the petition, would result in much practical inconvenience, and while, as has been pointed out, the question is not yet free from doubt, the more reasonable conclusion is that paragraph '*b*' is governed and limited by the provisions of paragraph '*a*.'"

Judge Lowell, in his treatise on Bankruptcy, on pages 487, 488, says:

"Paragraph *b* does not enlarge the class of debts which may be proved, but provides that if any claim coming within the scope of paragraph *a* is unliquidated, it may be liquidated and proved. The use of the word 'claims' shows that it was not intended to include causes of action arising out of tort. The act of 1867 included 'unliquidated damages' in actions of tort for conversion. The difference in phraseology is significant.

"If this clause were interpreted in the other way it would include all actions for tort, whether property were involved or not. No bankrupt law has ever done this, and it would be a strange anomaly if Congress should have extended in this direction the scope of the law which is so much more restricted in other respects than former laws. The word 'claim' is used in this country as a synonym for 'demand' or 'debt.' In the numerous instances where it occurs in this act it has the same meaning. The provisions of § 17 also throw light on the meaning of paragraph *b*. It is there enacted that a discharge shall release a bankrupt from all his provable debts, except, among other things, judgments for willful and malicious injuries to the person or property of another. The inference is plain that Congress did not intend that a cause of action in tort should give rise to a provable debt till it was reduced to judgment. Because otherwise it would have included such cases of action in § 17, as it is incredible that Congress should intend to release the debtor from liability for a tort but not from liability on a judgment for a tort. These considerations show conclusively that Congress did not include torts within the scope of paragraph *b*."

In re Yates, 114 Fed. Rep., 365 (district court, N. D. California, Feb. 24, 1902), was a motion to vacate a decree by which Yates was adjudicated a bankrupt. The only debt mentioned in the schedule filed with the petition for adjudication was a judgment in an action for a willful and malicious injury to the person of one Risdon. An appeal was taken from this judgment.

In the course of the opinion De Haven, district judge, said:

"Subdivision '*a*' of section 63, of the bankruptcy act enumerates five different classes of debts which may be proved against the estate of the bankrupt, in one of which is included 'a claim for a fixed liability as evidenced by a judgment or instrument in writing, absolutely owing by the bankrupt at the time of the filing of the petition against him;' but a cause of action against him for unliquidated damages for a personal tort, such as is involved in the action of *Risdon v. Yates*, before referred to, is not within either of the classes named. Subdivision '*b*' of the same section provides:

"'Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.'

"This subdivision is not to be construed as authorizing the proof of claims not declared in subdivision '*a*' to be provable. Its object is simply to provide that unliquidated claims which fall within the scope of subdivision '*a*' are to be liquidated in such manner as the court shall direct (Lowell, Bankr., p. 487; and see, also, the well-considered opinion of Judge Marshall in the case of *In re Hirschman*, 4 Am. Bankr. R., 716; 104 Fed., 69)."

Opposing counsel say (Brief, 52): "*In re* Hirschman, 104 Fed. Rep., 69, is directly in point." So far as the case is in point it is "directly in point" against them. Judge Marshall said:

"The intention of Congress was to specify in sub-section '*a*' all provable debts, and in sub-section '*b*' to provide for the liquidation of such as, falling under sub-section '*a*,' were yet unliquidated. This was to prevent the construction of this act in the way the older bankrupt acts in England were construed. Under those acts unliquidated damages, although arising *ex contractu*, were held not to be provable debts, because the statutes seemed to require the creditor to swear to a precise sum (Lee & Chapman's case, 30 Ch. Div., 216). The care used to particularize various provable debts in sub-section '*a*,' negatives the extended construction of sub-section

'*b*,' urged by petitioners. If the latter sub-section authorizes the liquidation and subsequent proof of damages *ex delicto*, the whole subject could have been covered in very general language. Assuming petitioners' construction of section 63, sub-sec. '*b*,' it would embrace claims arising from any tort. There is no language in the section which can be held to include some, and not all, torts. Yet the general policy of bankrupt acts has been not to include in provable debts claims for damages for personal wrongs. It is hardly possible, if Congress had intended such a departure from the history of bankrupt legislation, that it should not have expressed the intent unmistakably."

In re Big Meddows Gas Co., 7 Am. Bankr. Rep., 697 (U. S. district court, W. D. of Pennsylvania, Feb. 25, 1902), it is said at page 699:

"Subdivision '*a*' of section 63 defines, under five clauses, claims that may be proved. While subdivision '*b*' provides for the precedent liquidation, and, thereafter, for the proof of unliquidated claims."

Old Colony Boot and Shoe Co. *vs.* Parker, 183 Mass., 557, 561 (June, 1903), was a bill in equity against directors and stockholders to establish their personal liability for a debt of the company to the complainant, as shown by a judgment of the supreme court of Massachusetts. The defendant Sampson was a director. In the course of the opinion the court said:

"The bankruptcy act of 1898 permits the proof among others of '*a*, debts * * * (4) founded upon an open account, or upon a contract express or implied,' and provides that '*b*, unliquated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.'

"It would seem that this clause does not provide for an additional class of liabilities, but for a method by which such of the liabilities described in clause *a* as are unliquidated may be liquidated and proved. *We are of the opinion*

that clause b does not mean anything more than the language used in the bankruptcy act of March 2, 1867, c. 176, sec. 19, that where the bankrupt is liable * * * for unliquidated damages arising out of any contract or promise, or an account of any goods or chattels wrongfully taken, converted or withheld the court may cause such damages to be assessed in such mode as it may deem best, and the sum so assessed may be proved against the estate,' and that the liability of the defendant Sampson, as a director does not arise out of any contractual obligation or promise, and is not such an unliquidated claim, and by the express language of the act of 1898, sec. 17 (30 U. S. Sts. at Large, c. 541), the bankrupt is not released by a discharge unless the claim is not only provable, but is also a provable debt; not being a provable debt" etc.

It will be noticed that the provision of the act of 1867, allowing "unliquidated damages * * * on account of any goods or chattels wrongfully taken, converted or withheld" to be assessed and proved, was omitted from the act of 1898. The omission of the provision referred to very clearly indicates that it was the intention of Congress to permit no claim for unliquidated damages arising out of torts to be liquidated or proved under the provisions of the act of 1898. The omission, not of a word or two which might, inadvertently, have been left out, but the omission of an important and express provision, must mean the omission of the purpose with which the provision was inserted in the act of 1867.

Watertown Carriage Co. vs. Hall, 77 N. Y. Supp., 1028 (supreme court, appellate division, third department, September 3, 1902), was an action for conversion. Justice Smith, in delivering the opinion of the court, said:

"This case is now before us upon a re-argument ordered. The case as first decided, is reported in 66 App. Div., 84, 72 N. Y. Supp., 466. In the briefs presented upon that argument, it was stated that the bankruptcy law of 1898, was a substantial re-enactment of the act of 1867, and in the decision this fact was assumed. Upon a motion for re-argu-

ment, portions of the act of 1898 were called to our attention materially differing from the provisions of the act of 1867, and which, upon consideration, call for a reversal of the decision which we then made, and the affirmance of the decision of the court below. By section 17 of the act of 1898 it is provided that a discharge in bankruptcy shall release a bankrupt from all of his provable debts, except certain debts specified. By section 63 is defined what are provable debts. Under that section there are five classes of debts which may be proved against a bankrupt and allowed against his estate: (1.) A fixed liability, as evidenced by a judgment or an instrument in writing, etc. (2, 3.) Certain sums due as taxable costs. (4.) Debts founded upon an open account or upon a contract, express or implied. (5.) Judgments upon provable debts obtained after the filing of the petition and before the consideration of the bankrupt's application for a discharge. In none of these sub-divisions is included the claim set forth as a cause of action in the plaintiff's complaint herein. Under section 5067, Rev. St. U. S., 1875, which was a part of the bankruptcy law of 1867, among the provable debts were included 'all demands against the bankrupt for or on account of any goods or chattels wrongfully taken, converted or withheld by him.' Under that act it is clear, as was held, that a cause of action for conversion was released by a discharge in bankruptcy. In the present statute, however, this provision nowhere appears, and a demand for a conversion of property as such is no longer a provable debt, and therefore no longer released by a discharge in bankruptcy. Subdivision '*b*,' § 63, provides for the liquidation of unliquidated claims, but the unliquidated claims there referred to are claims specified in subdivision '*a*' of the section as provable debts. They are those provable debts which have not been so far liquidated as to make certain the amount which should be allowed against the bankrupt. This would seem to be indicated by comparison with the former bankruptcy law (Rev. St. § 5067), above cited, where similar provision is found. It is not necessary here to discuss what would be the situation if in the complaint the plaintiff had chosen to waive the tort. It has not so elected. (See Coll. Bankr., p. 399.)

"Appellant argues that the exceptions specified in section 17 indicate an intention to make provable other debts than

those specified in subdivision '*a*' of section 63. To this we disagree. The specification in section 63, subd. *a* of what are provable debts is clear, and will not be extended except by necessary implication. The discharge in bankruptcy constituted no defense to plaintiff's complaint, and the demurrer was properly sustained.

"Judgment affirmed with costs with usual leave to amend. All concur."

The claims of the defendant in error were for unliquidated damages arising out of tort, and did not come within any of the provisions of paragraph *a*. It was settled by this court, in the recent case of Dunbar *vs.* Dunbar, 190 U. S., 340, that such claims could not be liquidated or proved under the provisions of paragraph *b*. Mr. Justice Peckham, delivering the opinion of the court, said:

"In section 63*b* provision is made for unliquidated claims against the bankrupt, which may be liquidated upon application to the court in such manner as it shall direct, and may thereafter be proved and allowed against the estate. This paragraph *b*, however, adds nothing to the class of debts which may be proved under paragraph *a* of the same section. Its purpose is to permit an unliquidated claim coming within the provisions of section 63*a* to be liquidated as the court should direct."

With reference to "debts which may be proved," counsel for plaintiffs in error state their contention as follows (Brief, 51):

"Two views of paragraphs (*a*) and (*b*) and their relation to each other suggest themselves:

"1. That paragraph (*a*) classifies all claims that are provable, and paragraph (*b*) provides for the liquidation of such of them as are unliquidated at the date of the filing of the petition in bankruptcy.

"2. That paragraph (*a*) refers to claims of a contract character only, while paragraph (*b*) refers to, and includes additional claims not necessarily of a contract character, but of whatever character, so long as the demand and the right of action existed at the time of the filing of the petition."

Both views with regard to paragraph *b* cannot be correct. If the first view be right, the second is not. But counsel seek to avoid the danger of adopting the first view only, and rejecting the second, by saying:

"Under either view, the demand of defendant in error is a provable debt, because: 1. Debts of a bankrupt may be proved and allowed against his estate which are * * * (4) founded upon account or upon a contract express or implied (P. (*a.*) sec. 63). That is to say: if a claim 'may' be proved—if it possesses a provable character or quality in any view—it is a provable debt. The demand of the defendant in error possesses that quality. It is of a quasi-contract character. He may waive the tort and recover for money had and received to his use on an implied contract. This is the law of conversion."

Let us see by what process of reasoning counsel endeavor to show that the claims of defendant in error were provable under paragraph *a*. They do not say that the claims made by him were "founded upon an open account or upon a contract express or implied," because such a statement would be manifestly absurd. On the contrary, they admit (Brief, 49) that "the action, in form, is founded upon the alleged acts of fraud by conversion or misrepresentation of plaintiffs in error;" but they paraphrase the provision of the statute which allows the proof of debts which are founded "upon a contract, express or implied," by saying: "That is to say, if a claim *may* be proved—if it possesses a provable character or quality in any view—it is a provable debt." This is equivalent to saying, "If a debt is provable, it is a provable debt." Again, counsel say: "The demand of the defendant in error possesses that (provable) quality. It is of a quasi-contract character." Counsel probably did not mean precisely what they said. What they undoubtedly meant to say is indicated by the sentence which immediately followed:

"He may waive the tort and recover for money had and received to his use, as on an implied contract. This is the law of conversion."

Their argument, then, amounts to this: *If* the defendant in error had waived the tort—*if* he had waived the fraud—*if* he had founded his claims upon an implied contract—*then* his claims would have been provable. Suppose that to be so; what has it to do with the case at bar? Absolutely nothing. That question was not before the courts below for decision. It is not a question for decision in this court. The question is, not what kind of claims the defendant in error *might* have made; nor would the claims which he might have made have been provable; but what kind of claims *did* he make, and were the claims which he did make, provable? Is it not a queer kind of logic to predicate a proposition upon something which confessedly has no existence?

In Bixby *vs.* United States, 188 U. S., 405, this court, speaking by Mr. Justice Harlan, said:

"A party may, in some cases waive a tort; that is, he may forbear to sue in tort, and sue in contract, when the matter out of which his claim arises has in it the elements both of contract and tort."

If the matters out of which the claims of the defendant in error arose had in them the elements both of contract and tort, it is true that he might have waived the tort and have based his claims upon the legal fiction of an implied contract that plaintiffs would refund the money which they had obtained from him by means of false and fraudulent representations, and would also pay over to him the money which they had received from the sales of his property, which they had sold with the intent to cheat and defraud him. But what he *might* have done is one thing; what he *did* do was quite another and different thing. If he might have waived the

fraud and sued in assumpsit for money had and received, he did not see fit to do so. He was under no obligation to waive the fraud and base his claims upon an "implied contract." Not having done so, his claims were not provable.

Williamson vs. Dickens, 27 N. C. Rep., 259, "was an action on the case, in which the plaintiffs declared in tort for breach of contract, and also in trover for the conversion of certain bonds, notes and attorneys' receipts, which the plaintiffs had placed in the hands of the defendant, to be by him collected for them."

Nash, J., in delivering the opinion, said:

"And all the court agree, that when a plaintiff has an election as to the form of his action, the choice of the action is decisive of the question. So in the case of *Parker v. Crole*, 2 M. & P., 150, and 5 Bing., 63, it was decided that when the defendant, a broker, sold out the stock of the plaintiff contrary to his orders the plaintiff had an election either to affirm the sale and sue the defendant for the money received by him, or to bring an action of tort, and as he had brought the latter action, *the defendant was not protected by his certificate of bankruptcy*. These cases abundantly prove that, when the plaintiff has an election, he is not bound to prove his claim as a debt under the defendant's commission, though he may; *and when he sues in tort, the defendant cannot avail himself of the protection of the bankrupt law. * * * These damages are unliquidated, and can be ascertained only by a jury.*"

In Hughes *vs.* Oliver, 8 Pa. St. Rep., 426, which was an action on the case for deceit, the court said:

"I cannot believe that where a party has been guilty of a wrong or a fraud, that it was the design of the statute to protect him from the consequences of it, *merely because he* (plaintiff) *may*, if he thinks proper, *waive the tort and resort to an action as for money had and received*. If a man takes the horse of another, and afterwards sells him, the owner may waive the tort and recover the price in an action for money had and received; but is he bound to do so when possibly it may happen that it has been sold for half its value? Would the owner be compelled to prove a debt

*under the commission of bankruptcy? It seems to me clear that he would not. He, may, it is true, but he is not compelled to do so. * * * Where the right to damages at all, and also the amount of them, depend upon circumstances of which a jury alone can judge, and which therefore it is requisite the intervention of a jury to ascertain, such damages are not susceptible of proof under a commission.*"

In Graham *vs.* C., M. & St. P. Ry. Co., 10 N. W. Rep., 608, 612 (cited by plaintiffs in error), it is said:

"The plaintiff may waive the tort when the defendant has possession of his money, and sue upon the implied promise to refund it; but he is not compelled to waive it in order to recover, and may, if he sees fit, recover upon the tort, and make that the foundation of his action."

Bradner vs. Strong, 89 N. Y. Rep., 299, 306, was an action to recover damages sustained in consequence of the false and fraudulent representations of the defendants. The defendants procured certain promissory notes in March by representing that certain notes given in February had not and could not be used. In the opinion the court said:

"The claim of the plaintiff for damages on account of the fraud committed upon them by the defendants was not discharged by the bankruptcy proceedings. Debts only are provable in bankruptcy, and, therefore, only can be discharged in bankruptcy (U. S. R. S., secs. 5014, 5017, 5118). *This claim for damages could no more be discharged in bankruptcy than a claim for damages caused by libel, slander or an assault and battery (Morse v. Hutchins*, 102 Mass., 439; *In re Jones*, 2 N. Bank. R., 27). The cases of *Hennequin v. Clews*, 77 N. Y., 429, 33 Am. Rep., 643, and *Neal v. Clark*, 95 U. S., 704, do not apply to a case like this."

On appeal to this court (Strong *vs.* Bradner, 114 U. S., pp. 555, 560) Mr. Justice Harlan, delivering the opinion of the court, said:

"That representation—as the jury on ample [illegible]—was made with the intent to deceive the plaintiffs in reference to the

grand scale of things, and to value them in a way that defendants have they would not otherwise have done or been asked to do. If Strang's conduct does not constitute positive fraud or fraud in fact, involving intention, wrong it is difficult to conceive what circumstances would have amounted to fraud of that character.

"It is contended, however, that as Strang & Holland were sued under a legal obligation, apart from any responsibility for the alleged fraudulent representations by Strang, to protect the plaintiffs against liability on the notes dated in March, the latter could have a claim against the estate of the several bankrupts for such amounts as they were compelled to pay on account of their being accommodation makers and indorsers, consequently it is argued the defendants are released, by their respective discharges in bankruptcy, from the present claim for damages. To this proposition there are two answers: 1. *While the plaintiffs might have based their claim entirely upon the legal obligation of the bankrupts to take up the notes at their respective maturities, they were not bound to move their right to prove against the defendants for damages on account of fraud in procuring their execution.* This action is brought to recover damages for the deceit practised upon the plaintiffs. *The claim here asserted is not one from which the bankrupts are protected by their discharges, for it is not a claim provable against their estate in bankruptcy* (Rev. Stat., sec. 5057-5073, inclusive, 5117, 5118). 2. But had the plaintiffs waived their right to claim damages specifically for the deceit practised upon them and made a claim against the estate of the bankrupts based wholly upon their legal obligation to save plaintiffs harmless on account of their being the makers and indorsers of the notes in question, or if the present action had been based upon that obligation, and not upon the fraud committed by defendants, it would not follow that the debts sued would be protected by their discharges in bankruptcy."

It is simply absurd to say that the claim made by the defendant in error was provable because he might have made claims of an entirely different character from those which he did make, and that such claims if made would have been provable.

In support of their "first view," counsel for plaintiff in error have cited several cases to show that if a claim is of such a character that the tort may be waived and recovery had in assumpsit, then, if the claimant sees fit to waive the tort and base his claim upon the implied contract, the claim may be proved. That is purely an academic question. It is not pertinent to any issue in the case at bar. This, we think, has been sufficiently shown.

It will be noticed that counsel have not cited a *single case* in support of their "second view," namely, that "paragraph *b* refers to and includes claims, not necessarily of a contract character, but of whatever character."

The act of 1867 provided for the liquidation and proof of "unliquidated *damages* arising out of any contract or promise." The act of 1898 provides for the liquidation and proof of "unliquidated *claims*" which are "founded upon an open account or upon a contract, express or implied." The former act provided that the court might "cause such damages to be assessed in such mode as it may deem best." The act of 1898 provides that "unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

In Old Colony Boot & Shoe Co. *vs.* Parker, 183 Mass., 557, 561 (June, 1903), the court said:

"We are of the opinion that clause *b* does not mean anything more than the language used in the bankruptcy act of March 2 1867 c. 176 sec. 19, that where the bankrupt is liable * * * for unliquidated damages arising out of any contract or promise, or on account of any goods or chattels wrongfully taken, converted or withheld, the court may cause such damages to be assessed in such manner as it may deem best, and the sum so assessed may be proved against the estate."

A claim which could not be liquidated and proved under the act of 1867 certainly cannot be liquidated and proved

under the act of 1898. Under the act of 1867, it was held by this court in Bradner *vs.* Strang, 114 U. S., 555, 560, that a claim for damages on account of positive fraud of the bankrupt (procuring the execution of promissory notes by false representations) was not provable in bankruptcy. The doctrine of that case is strictly applicable to the case at bar, and it would seem that further discussion of the point under consideration is wholly unnecessary.

It may be mentioned here that the plaintiff received no share of the dividend declared by the receiver appointed by the court at the time of defendant's failure. The plaintiff did not file his claims with the receiver, because they were unliquidated and contested, and could not be proved except in the manner in which they were proved, namely, by obtaining a judgment.

While the record does not show that the State supreme court passed upon the question as to whether the claims of plaintiff in error were provable, yet, the question appears of record, and was raised and argued in each of the courts below, and calls into exercise the jurisdiction of this court. The question is involved in the main question: Was the discharge in bankruptcy of plaintiffs in error a bar to the claims in controversy? If the claims were not provable, the discharge was not a bar, and the judgment should be affirmed (Collier *vs.* Stanbrough, 6 How., 21; Dewey *vs.* Des Moines, 173 U. S., 197, 198; Murdock *vs.* Memphis, 20 Wall., 590, 636).

II.

The qualifying clause in subdivision 4 of section 17 of the bankruptcy act of 1898, namely, "while acting as an officer or in any fiduciary capacity," refers, both grammatically and logically, to its next antecedent only, which is the term "defalcation," and does not apply to or restrict the terms "fraud" or "embezzlement."

Section 17 of the bankruptcy act of 1898 is as follows:

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the State, county, district or municipality in which he resides; (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

1. The presumption is that the reading of a statute according to its grammatical construction gives its correct sense. The grammatical construction should be followed unless it will pervert the legislative intent.

In Lake County *vs.* Robbins, 130 U. S., 662, 670, this court said:

"To get at the thought or meaning expressed in a statute, a contract, or a constitution, the first resort in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them."

We desire to call the attention of the court to the case of The City Safe Deposit and Surety Co. *vs.* Lee, 107 Ill. App., 263. 204 Ill. Supreme Court, 69. Our failure to cite the case under point II, before our brief was printed, was an oversight. The case is directly in point.

In Endlich on Interpretation of Statutes, section 2, the author says: "Phrases and sentences are to be construed according to the rules of grammar."

In 26 Am. & Eng. Encyl. of Law (2d ed.), page 613, it is said:

"In accordance with strict grammatical construction it is said that qualifying words and phrases should be confined to their *next antecedent*, but this rule is frequently neglected, and is always subservient to the legislative intent."

In *Cushing vs. Worrick*, 9 Gray, 382, 385, the main question related to the construction that should be given to the following clause:

"And also reserving to the town of Hull the privilege of the shores, and of feeding all lands not comprehended within the aforementioned bounds."

The court said:

"The question is whether 'the privilege of the shores' including, of course, the right to take seaweed, is limited to shores 'not comprehended within the aforementioned bounds;' and the court are of the opinion that this privilege is not so limited.

"It is not necessary to resort to the draft of the bill as passed to be engrossed, in order to explain the statute as actually engrossed; for the general rule is that the punctuation is no part of a statute (Barrington on Sts. (5 ed.), 439, note; 3 Dane Ab., 558; Dwarris on Sts. (2d ed.), 601). *And in this case the omission of the comma between 'lands' and 'comprehended' makes the case clear in favor of the defendants; while its insertion does no more than to make it grammatically possible to apply the limiting clause to the shores, as well as to the feeding lands. But such a clause is ordinarily to be confined to the last antecedent, unless there is something in the subject-matter which requires a different construction* (Finch, Lib. 1, c. 3; *Noyes v. Max* (6 ed.), 2; Dwarris on Sts., 590, 591, and authorities cited)."

In *State vs. Jernigan*, 3 Murphey, 12, 18, Chief Justice Taylor, in delivering the opinion of the court, said:

"The rule of grammar that words shall be referred to the next antecedent, has been adopted and enforced in the law from an early period, and has had a direct influence upon the decision of many cases. But much to the credit of the sages of the law, it has uniformly been received and practiced upon, with its proper limit and qualification, so as to fulfill the intention of the legislature in civil matters, to ascertain the design of parties in private contracts, and to furnish a rational exposition of every instrument, public and private, that called for the judgment of a court. As a rule of legal construction, it stands thus, *Proximo antecedenti fiat relatio, nisi impediatur sententia;* and in the various cases in which it has been introduced, it has been rendered instrumental towards effecting a right understanding of the subject, and rendering substantial justice. A man agrees to abide the award of J. S., who awards that he shall pay before such a feast ten pounds to another, and that *then* the other shall make him a release. The word *then* shall not be referred to the feast, but to the time of payment of the money. The statute 32 Henry VIII. ordains that none shall buy right or titles in land, unless such persons have been in possession of it, or of the reversion or remainder of it, or have taken the rents and profits of it, for the space of one whole year next before. Here these words, 'by the space of one whole year,' *shall be referred only to the sentence next before, viz.: to the taking the rents and profits.*"

Dearborn vs. Inhabitants Brookline, 97 Mass., 466, 469, involved the proper construction of the following section of the statute:

"SEC. 9. Any town or city may appropriate money for suitable buildings or rooms, and for the foundation of a library a sum not exceeding one dollar for each of its ratable polls in the year next preceding that in which such appropriation shall be made."

Chief Justice Bigelow, in delivering the opinion of the court, said:

"We cannot bring ourselves to entertain a doubt concerning the interpretation of the statute upon which this controversy hinges. In the first place the *grammatical construction* of the words does not lead to the conclusion for which the petitioners contend. A town or city is authorized to '*appropriate money for suitable buildings or rooms*,' *and for* '*the foundation of a library a sum not exceeding one dollar for each of its ratable polls*' (Gen. Sts., sec. 9). The words 'not exceeding,' in that sentence do not necessarily qualify and limit the entire first clause. On the contrary, we think it apparent that they were intended to restrict the latter provision with which they are immediately connected; that is, that the intention of the legislature was to put a precise limit on the sum to be expended for books, and not on that to be appropriated for buildings or rooms. Unless this interpretation is adopted there would be an inexplicable redundancy in the sentence. The use of both the words money and sum would be unnecessary. One of them would be wholly superfluous. But, as both are used *ex industria*, an intent is indicated to express a meaning which the use of one alone would not clearly set forth. Both words are made operative and effective by construing them as applied each to a distinct subject, the one to the cost of buildings or rooms, the other to the purchase of books."

In *Whetmore vs. Whetmore*, 17 Pa. County Repts., 11 (1896), the court, in construing a provision of the statute, said:

"The operative words of this act pertinent to the question before us are these: 'The husband * * * or the wife * * * may exhibit his or her libel to the judges * * * in term time, or to one of the judges * * * in vacation at least thirty days before the next term * * * and thereupon a subpœna shall issue from the said court, etc., * * *

"Punctuation is no part of a statute. Courts should punctuate only to promote the manifest intent of the legislature in construing its acts. Where the intention is obscure or doubtful they may not only punctuate, but may transpose clauses or phrases to make the meaning clear. Yet, unless, the following of the grammatical construction of a statute will obviously pervert the plain legislative intent,

it should be adhered to in construing statutes susceptible of more than one construction. Following this rule, and, adhering to what we regard as the plain *grammatical construction* of the section under consideration, we hold that the clause 'at least thirty days before the next term' *relates only to its next antecedent* 'or to one of the judges of the same court in the vacation.'

"For it is a fundamental rule of construction that a relative word or clause has reference to its *first antecedent only*, unless to restrict its application will manifestly do violence to the plain intent of the language employed in connection with it. And especially is this so where such next preceding antecedent is introduced, as is the case here, by the disjunctive 'or,' always assuming that manifest intent or object will not be defeated by such construction."

Quinn vs. Lowell Electric Light Corp., 140 Mass., 106, was an action in tort for a nuisance in maintaining and using a steam-engine, boilers and machinery for generating electricity for lighting purposes at the defendant's works within 300 feet of plaintiff's dwelling-house. Defendant justified under a license from the mayor. In the opinion of the court, delivered by Judge Allen, he said:

"The license was under the Pub. Sts., c. 102, sections 40, 47, which prohibits the erection of a stationary engine within five hundred feet of a dwelling-house or public building without a license, in any city or town in which the statute of 1862, c. 74, has been adopted 'at a legal meeting of the city council of the city or the inhabitants of the town called for that purpose.' The statute of 1862, c. 74, was adopted at a regular meeting of the city council, and not at a special meeting called for that purpose. We think that the requirement that the adoption shall be at a meeting called for the purpose is limited to an adoption by the inhabitants of a town, and does not apply to the action of a city council, which is usually composed of different bodies, acting at regular meetings and under prescribed rules of procedure."

Price *vs.* Price, 10 Ohio St. Rep., 316, involved the construction of a section of a statute relating to appeals in certain cases. The court said:

"That section as it stands punctuated, appears at first blush to be somewhat obscure. This apparent obscurity arises mainly, if not entirely, from its defective and improper punctuation. The section when properly punctuated reads thus: Etc. As repunctuated, the court construed the statute."

In *Hamilton vs. Steamboat, etc.*, 16 Ohio St., 428, the court sustained a motion in arrest of judgment because the petition did not contain an averment that the defendant was a steamboat over the tonnage of twenty tons. In the opinion, the court said:

"Whether the court erred in this holding depends on what is the proper construction of the first section of the act upon which the action is founded. The act was passed February 26, 1840, and the first section, as amended March 10, 1860, reads as follows:

"'That *all* steamboats and other water crafts *of twenty tons burden and upwards*, navigating the waters within or bordering upon this State, shall be liable, *and such liability shall be a lien thereon* for all debts,' etc.

"The only change in the original section, for which this was substituted, was made by inserting therein the words here italicized for the purpose only of showing, without repeating, the language of each section.

"It is clear, from the amended section, that the legislature intended to limit the special remedy thereby given against water crafts other than steamboats, to those of twenty tons burden and upwards; but it is not so clear that such was the intention as to steamboats. There is not the same reason for exempting the latter as there is the former from the operation of the statute. * * *

"But for the punctuation as it stands, there could be little doubt but that this was the meaning of the legislature. Courts will, however, in the construction of statutes, for the purpose of arriving at the real meaning and intention of the law-makers, disregard the punctuation, or re-punctuate, if need be, to render the true meaning of the statute (10 Ohio St. Rep., 316; Bouv. Law Dic., 347, 402).

"If the punctuation in the first line followed the word 'steamboats,' the purpose for which the word 'all' was in-

serted in the amendment, as well as the true meaning of the section would be more obvious.

"But we think all doubt as to the proper construction of the section may be settled by the application of the rule that, in the construction of revised or amended statutes, the original statute will not be regarded as changed further than clearly appears to have been intended by the legislature (2 Hill, 380).

"The statute, before the amendment, had given a remedy against steamboats and other water crafts by name without reference to their tonnage. The amendment clearly limits this liability of water crafts other than steamboats, to those of twenty tons burden and upwards; but it does not appear clearly that the same change was intended to be applied to steamboats; on the contrary, the amendment is fairly, if not clearly, susceptible of directly the opposite construction; and is therefore a proper case for the application of the foregoing rule. It follows that actions against steamboats are not limited to those of twenty tons burden and upwards," etc.

In *Zimmerman vs. Willard et al.*, 114 Ill., 364, Willard made an assignment for the benefit of his creditors, and executed and acknowledged the same in the city of St. Louis. The deed of assignment was recorded in Union county, where Willard resided. Chief Justice Mulkey, in delivering the opinion of the court, said:

"The point is also made that the court erred in admitting the deed of assignment in evidence, against the objections of appellant. The grounds of the objection are twofold: First, that the deed was acknowledged outside of the State; and second, that the certificate of acknowledgment is insufficient in this, that it does not state the grantor appeared before the notary *in person*. The first section of the act of 1877, under which the assignment was made, provides, among other things, that 'every assignment shall be duly acknowledged and recorded in the county where the person or persons making the same reside,' etc. The deed in question was, as we have already seen, duly recorded in Union county, where Willard resided; but the contention of appellant is, that it should also

have been acknowledged there. We do not think that this is a fair or reasonable construction of the language cited. While the object of the legislature in requiring the deed to be recorded in the county where the assignor resides, etc., is quite apparent, yet no possible reason is perceived for requiring it to be acknowledged there. The place of acknowledgment would therefore seem to be wholly inconsequential, and to limit it to a particular place would certainly, in many cases, lead to great inconvenience, and in some would probably operate as a denial of the right of a failing debtor to make such an assignment at all. A construction which would lead to such results ought not to be adopted unless the statute plainly and imperatively demands it. We do not think it does in this case. Had a comma been inserted after the word 'acknowledged,' as it should have been, *no one would have thought of that word being limited by the qualifying member of the sentence, 'in the county where the person or persons making the same reside,'* etc., and we are of opinion that sound reason and public convenience alike require the provision in question to receive the same construction as if the comma had been so inserted. We therefore hold that the requirements of the statute were fully met by the recording of the instrument in Union county, the place of Willard's residence."

In their brief in the courts below counsel said:

"Punctuation may not be entirely controlling in the interpretation of the law, but it has some bearing."

That is undoubtedly true, and, therefore, we agree with them. In the State appellate court, counsel for plaintiffs in error filed separate briefs, in each of which a comma was inserted between the word "defalcation" and the qualifying clause, "while acting as an officer, or in any fiduciary capacity" (a remarkable coincidence!). As so punctuated, they proceeded to interpret the statute. They based their construction of the subdivision in question largely upon the punctuation. After we had shown that their punctuation was incorrect and misleading, they said in their reply brief: "We are sure that the court will acquit any of the counsel

from any *design* to mislead it." By implication they admitted that their punctuation was misleading. How misleading? Certainly in no other way than by leading to a wrong construction of the statute; and yet they insist in this court upon the same construction that they contended for when their incorrect punctuation made their contention plausible from a *grammatical* point of view.

Even now the statute, as quoted in their brief, is incorrectly punctuated. They omit the comma between the word "misappropriation" and the following word "defalcation," and then make the misstatement that "It is admitted that the terms 'misappropriation' and 'defalcation' are so related" (Brief, p. 66).

In the court below counsel further said:

"If the words of the fourth clause are to be read in their plain, grammatical sense, in the only sense that can be put upon them without violently wresting them from their connection, and as it were breaking the backbone of the sentence in several places, there is an end to this case. But the appellee says, as we understand him, that the sentence should read as follows: 'or (fourth) were created by his fraud; embezzlement; misappropriation; or defalcation while acting as an officer, or in any fiduciary capacity.'"

Counsel virtually admitted that if semicolons had been used instead of commas the punctuation would show that our construction of the statute was correct.

Our contention is that, in so far as punctuation is a guide in the interpretation of the law, the punctuation of the subdivision in question requires the construction which we have placed upon it. That construction is demanded also by the obvious and natural import of the language, giving to it the ordinary grammatical construction. If, however, it were true that semicolons should be substituted in the place of commas "for the purpose of arriving at the real meaning and intention of the law-makers," then we say that the court

would repunctuate the subdivision in question. In Hamilton *vs.* Steamboat, etc., 16 Ohio St., 428, the court said:

"Courts will, however, in the construction of statutes for the purpose of arriving at the real meaning and intention of the law-makers, disregard the punctuation or *repunctuate*, if need be, to render the true meaning of the statute" (10 Ohio St. Rep., 306; Bouv. Law Dictionary, 347, 402).

There are numerous authorities to the same effect.

In *Price vs. Price*, 10 Ohio St., 316, the court repunctuated a section of the statute by substituting semicolons for commas, in order to carry out the intention of the legislature and make the meaning of the statute clearer; and it probably never occurred to the court that it had been guilty (as counsel would say) of "breaking the backbone of the sentence in several places," or, in fact, of breaking any bones whatever in the body of the sentence.

Cushing *vs.* Worrick, *supra;* Price *vs.* Price, *supra*, and Hamilton *vs.* Steamboat, etc., *supra*, were cited by this court with approval in Hammock *vs.* Loan & Trust Co., 105 U. S., 77, 84, and again in Joy *vs.* St. Louis, 138 U. S., 1, 32.

In a monograph on the subject of "Punctuation—How Considered in the Law," published in 45 Central Law Journal, 229, 236, it is said:

"As far as the office of punctuation marks may be supposed to be understood by the one using them (or, perhaps, commonly understood), the rule concerning the use of such marks may be applied in construing the instrument. * * * In some of the cases where the judges seem, in their statement of the rule, to give an undue force to punctuation, we find them actually deciding the case on the intention, which in reality was only aided by the punctuation. In other cases where the judges affect to give not the slightest notice to punctuation, they are really deciding that the significance urged for the punctuation in question is a strained and unnatural one. Some of the judges are prone to rail at punctuation in general whenever they refuse to allow it to decide the case in question; others are inclined to elevate it in impor-

tance beyond its proper place whenever they find that it chimes with the intention as they see it. Properly, punctuation has a position in the law, though a subordinate one. Being used in the instrument with intent to make the meaning plainer, it should certainly be considered in court to aid in discovering that meaning."

In *Albright vs. Payne*, 1 N. E. Rep., 20, it is said:

"Punctuation may aid in arriving at the meaning of a statute, but does not control."

In Joy *vs.* St. Louis, 138 U. S., 1, 32, the question was whether certain words in an instrument qualified not only the immediate clause, but also a prior one. It was contended that the qualifying clause applied to both the preceding clauses. This court said:

"As against this it must be observed that, grammatically, *a relative clause generally qualifies its immediate antecedent*, and therefore, in this case, would refer simply to that clause which provides for the assumption by the Kansas road. This natural grammatical construction is strengthened by the *punctuation*—a comma after the words 'party of the second part' and none after the words 'party of the third part,' which seems to separate the entire first clause from the second and qualifying terms. I know that the matter of punctuation is never relied upon to defeat the obvious intent; but, when the meaning is doubtful, the punctuation is certainly a matter tending to throw light upon it."

"Further there are not simply two, but really three antecedent clauses, the first one being 'the terms of the said contract between them,' that is, the two railroad companies. Very clearly this qualifying clause does not refer to that, and therefore it should not be held to qualify the second, unless the obvious intent compels such construction."

2. The qualifying clause "while acting as an officer, or in any fiduciary capacity," so far as it relates to debts, has reference only to debts created by a breach of trust in the administration of trust property *lawfully in the possession* of an

officer or trustee of an express trust and held by him in his official or fiduciary capacity. The clause has not, nor was it ever intended to have, any application to debts which were not incurred in the administration of a trust estate. It is obvious that the clause is not applicable to debts created by torts committed in obtaining the *possession* of property—for example, debts created by theft or robbery or by obtaining property by means of false and fraudulent representations. That being so, it may be asked, To what class of debts, created by positive fraud, does the clause apply?

It cannot be held that the clause applies to some classes of debts created by positive fraud, but not to all. It is our contention that the clause in question has no other or different meaning or application in the act of 1898 than it had in the acts of 1841 and 1867. Under the act of 1867 it was never held, or even suggested, that the clause "while acting in any fiduciary character" applied to or restricted the term "fraud." This is conceded by plaintiffs in error.

Neither does the clause in question restrict the term "embezzlement," which is a specific term and imports the violation of a trust. In Moore *vs.* United States, 160 U. S., 268, this court held that "embezzlement is the fraudulent appropriation of property by a person to whom it had been intrusted, or into whose hands it has lawfully come; and it differs from larceny in the fact that the original taking of the property was lawful, or with the consent of the owner, while in larceny the felonious intent must have existed at the time of the taking." The correctness of the above definition of "embezzlement" was reaffirmed by this court in the recent case of Grin *vs.* Shine, 187 U. S., 181, 196.

The trust violated by an embezzler may, however, be either an express or technical trust, or one *implied by law.* But the phrase "fiduciary capacity" refers only to technical or express trustees and does not apply to clerks, servants, or agents who embezzle the property of their employers and thereby violate an *implied trust.* The clerk, servant, or

agent who commits the crime of embezzlement, and violates an implied trust, is just as much of a malefactor as the technical trustee who commits a like crime and violates an express trust.

In this connection it may be said that embezzlements committed by clerks, servants, and agents are of common occurrence, while embezzlements committed by technical trustees are comparatively few.

We submit that in regard to the exception of debts from the operation of a discharge, the statute makes no distinction whatever between the embezzler who violates an express trust and the embezzler who violates an implied trust; and no substantial reason can be given why a distinction should be made, the degree of guilt or moral turpitude being as great in the one case as in the other. In Central National Bank *vs.* Connecticut Mutual Life Ins. Co., 104 U. S., 54, this court, by Mr. Chief Justice Fuller, said:

"What is a fiduciary relationship? It is one in which, if any wrong arise, the same remedy exists against the wrong-doer on behalf of the principal as would exist against a trustee on behalf of a *cestui que trust*. * * * There is no distinction between an express trustee and an agent, or bailee, or collector of rents, or anybody else in a fiduciary position."

That the bankruptcy act of 1867 excepted from the operation of a discharge not only debts created by positive fraud, but also debts created by embezzlement, whether the trust violated was an express trust or one implied by law, has never been questioned. There is nothing in the act of 1898 to indicate that a change of policy in that regard was ever contemplated by Congress. Indeed it would be strangely inconsistent, and an anomaly in the law, to provide for the release of one, and by far the largest, class of embezzlers, from debts created by their embezzlement, and to refuse to release another class of embezzlers from debts likewise created by their embezzlement. *If the term "embezzlement,"*

which imports a trust relation, is not limited to officers and technical trustees, it certainly cannot be said that the term "fraud," which does not imply any trust relation whatever, is limited or restricted by the clause under consideration.

But when we come to consider the meaning and scope of the term "defalcation," it will be further apparent that the clause "while acting as an officer or in any fiduciary capacity" does not apply to or restrict either the term "fraud" or the term "embezzlement."

In the American and English Encyclopedia of Law (vol. 9, p. 166, 2d ed.) a definition of the term defalcation is given as follows:

"Defalcation is a failure of one who has received money in trust or in a fiduciary capacity, to account and pay over as he ought; and in this sense the word applies particularly to the acts of public and corporate officers."

In Black's Law Dictionary the term "defalcation" is thus defined:

"The act of a defaulter; misappropriation of trust funds or money held in any fiduciary capacity; failure to properly account for such funds. Usually spoken of officers of corporations or public officers."

Debts created by "defalcation while acting as an officer or in any fiduciary capacity"—in other words, official or fiduciary debts—are those, and those only, which arise from a failure to pay over or properly account for trust funds, the *possession* of which was lawfully obtained by an officer or technical trustee in his official or fiduciary capacity. Defalcation imports the misappropriation of property *lawfully acquired* and held in trust. The non-payment of a debt or liability arising from the acquisition of property by fraud or crime is not a defalcation.

As before stated, the clause, "while acting," etc., so far as it has reference to debts, applies only to official or fiduciary debts incurred by an officer or by a trustee of an express

trust. Debts are fiduciary only when a trust relation exists between the debtor and the creditor at the time the debt is created. In Upshur *vs.* Briscoe, 138 U. S., 378, this court said:

"It is to be noted that the language of section 33 of the act of 1867 excepts debts created by the bankrupt 'while acting in any fiduciary capacity;' and the language would seem to apply only to a debt created by a person who was acting in any fiduciary character when the debt was created."

Fiduciary debts, in the sense in which the term "fiduciary" is used in section 17 of the bankruptcy act, are those only which a technical or express trustee owes to the *cestui que trust* or beneficiary. Such debts the trustee must pay when properly called upon to do so; otherwise, he is in default; he is a defaulter; his failure "to properly account and pay over as he ought" is a defalcation. If there is no defalcation there is no debt (Madison Tp. *vs.* Dunkle, 114 Ind., 262, 265). Therefore, the term "defalcation" is broad enough to cover every indebtedness for which the debtor becomes liable, either as an officer or as a trustee of an express trust. Section 1 of the bankruptcy act of 1841 provided:

"Debts created in consequence of a defalcation as a public officer, or as executor, administrator, guardian, or trustee, or while acting in any fiduciary capacity" should not be released by a discharge.

In Chapman *vs.* Forsyth, 2 How., 202, 208, this court, speaking of the act of 1841, said:

"A misapplication of trust funds, as declared, covers the enumerated cases in the 1st section."

The enumerated cases in the 1st section related to debts created by defalcation while acting in a fiduciary capacity, and the court held that a misapplication of trust funds covered such cases. A misapplication of trust funds was

characterized by Congress as a "defalcation." The term "defalcation" and the clause, "while acting," etc., have precisely the same meaning and application in the act of 1898 that they had in the acts of 1841 and 1867.

In Collier on Bankruptcy (3d ed.), at page 199, it is said:

"The act of 1841 provided that 'debts created in consequence of a defalcation as a public officer or executor, administrator, guardian, or trustee, or while acting in any fiduciary capacity' should not be released by a discharge. These terms have already been defined under prior acts, *and the decisions are applicable under the present act.*"

At page 209 the same author says:

"Whenever a debt is due by a testamentary trustee, executor, administrator, or guardian, as such, it is not released by a discharge. These are the 'technical trusts' referred to in the act of 1841, and uniformly held to create obligations not affected by a discharge. But the debt must be one due from the trustee, as such, not an individual indebtedness of his, even though connected with the trust estate. Thus a sum of money due from an executor to a legatee is a fiduciary debt, and is not released by his discharge in bankruptcy" (*In re* Crisfield, 55 Md., 192).

If, upon an accounting, a guardian, executor, administrator or express trustee is found to be indebted, in his fiduciary capacity, to his ward, beneficiary, or *cestui que trust*, and refuses, or fails to pay over, when properly required to do so, his discharge in bankruptcy does not release him from such indebtedness, whether the indebtedness had been created with an honest or a dishonest intent. In either case he is a defaulter. It has been uniformly held that obligations of that character are not affected by a discharge. Such has been the policy of all bankrupt laws with the exception of the bankruptcy act passed by Congress in 1800, and in which no debts were excepted in express terms. In no instance is a beneficiary or *cestui que trust* compelled to show fraud involving moral turpitude in order to bring a debt

due to him from an express trustee within the exceptions of the statute. Debts or liabilities created by defalcation arising from the mismanagement or unintentional wrongdoing of a trustee, are not barred by his discharge in bankruptcy; but if the clause in question applies to and limits the term "fraud," as counsel contend it does, then debts created by fraud in the administration of a trust estate are not barred unless the fraud involved moral turpitude. Counsel's construction leads to the absurdity of supposing that a *cestui que trust* or beneficiary would base his action upon the positive fraud of his trustee, when it would be sufficient to show simply a *defalcation*. It is quite obvious that the term "fraud" relates only to debts or liabilities which are not fiduciary in their character within the meaning of the law.

As the term "defalcation" is comprehensive enough to cover every official or fiduciary debt which an officer, or trustee, owes and refuses or fails to pay, the word "fraud" is entirely superfluous if subdivision 4, in which it is found, is confined or restricted to debts created in an official or fiduciary capacity; but if the word "fraud" be construed as applying to other than official or fiduciary debts and liabilities, as it was evidently intended it should be, we discover a substantial reason why it was used; we see that a purpose was thereby subserved, in accordance with the obvious policy of the statute, to except from the operation of a discharge debts and liabilities created by positive fraud involving moral turpitude, regardless of the capacity in which the debtor was acting at the time the fraud was committed. Such was the construction under the act of 1867.

In Frey *vs.* Torrey, 75 N. Y. Supp., 40, Justice Loughlin said:

"If the words 'fraud,' 'embezzlement,' and 'misappropriation' are all qualified by the clause, 'while acting as an officer or in any fiduciary capacity' it is difficult to see the purpose of the use of the word 'fraud' at all."

It is a canon of construction that no word in a statute shall be regarded as superfluous if a meaning not fully expressed by associate words can be ascribed to it. Every word of a statute is presumed to have been intended to have some force and effect; and no word in it is to be treated as unmeaning or superfluous, if a construction can be legitimately found which will preserve it and make it effectual.

Endlich on Interpretation of Statutes, secs. 23, 265, and cases cited.

In *Montclair vs. Ramsdell*, 107 U. S., 152, this court said :

"It is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed."

In Bishop on Stat. Crimes (3d ed.), sec. 82, the author says:

"Every word and clause should, if possible, have assigned to it a meaning, leaving no useless words."

In Opinion of the Justices, 22 Pick., 571, 575, Chief Justice Shaw said :

"But it is a sound rule of construction that every clause and word of a statute shall be presumed to have been intended to have some force and effect."

In *Commonwealth vs. McCaughey*, 9 Gray, 296, 297, Justice Metcalf said :

"For it is an anciently established rule in the interpretation of statutes, that such a sense is to be made upon the whole statute, that no clause, sentence or word shall prove superfluous, void or insignificant, if, by any other construction they may be made useful and pertinent (1 Show, 108; Bac. Ab. Stat., 1, 2)."

In Wilmot *vs.* Mudge, 106 U. S., 217, it is said, "that effect shall be given to all the words of a statute when this is possible without a conflict."

III.

Section 33, of the bankruptcy act of 1867, was substantially a re-enactment of the act of 1841, in that regard, with the additional provision that no debt created by fraud or embezzlement shall be discharged.

Section 1 of the bankruptcy act of 1841 contained the following provision:

"Debts which shall have been created in consequence of a defalcation as a public officer, or as executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity," should be excepted from the operation of a discharge.

Section 33 of the bankruptcy act of 1867 (Rev. Stat., 5117) provided:

"That no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this act; but the debt may be proved, and the dividend thereon shall be a payment on account of said debt."

In *Noble vs. Hammond*, 129 U. S., 65, 69, Mr. Justice Lamar, in delivering the opinion of the court, said:

"Under sec. 5117 (sec. 33 act 1867), *which is substantially a re-enactment of the provision of the act of 1841* in this regard, with the single additional provision that 'no debt created by fraud shall be discharged,' etc., this court, on the line of the same reasoning, has construed the word 'fraud,'" etc.

IV.

The construction to be given to section 33 of the bankruptcy act of 1867 (Rev. Stat., sec. 5117), with reference to the release of a bankrupt from debts or claims created by his positive fraud, was determined by this court in the following cases: Strang vs. Bradner, 114 U. S., 555; Ames vs. Moir, 138 U. S., 306, and Forsyth vs. Vehmeyer, 177 U. S., 177. In those cases it was held that a discharge in bankruptcy did not release a bankrupt from debts or claims which were created by his positive fraud involving moral turpitude or intentional wrong, while not acting as an officer or in any fiduciary capacity at the time he committed the fraud.

In *Strang vs. Bradner, supra*, the special business of the appellees was to purchase wool, which they forwarded to appellants as commission merchants to sell on account. Appellees, for the accommodation of appellants, often furnished them with promissory notes for the purpose of enabling them to carry on business. By false and fraudulent representations that certain notes given by appellees in February had not been used, appellants obtained from appellees, in March, a new set of notes.

Mr. Justice Harlan, delivering the opinion of the court, said:

"The present suit, brought to recover a judgment for the amount plaintiffs were compelled to pay to *bona fide* holders of the March notes, proceeds upon the ground that the appellees have sustained damages by reason of the false and fraudulent representations made by Strang, on behalf of his

firm, whereby the appellees were induced to execute and deliver to that firm the four notes dated in March, 1875. Is this claim for damages of a class from which the bankrupts were relieved by their respective discharges in bankruptcy? * * * If Strang's conduct does not constitute positive fraud or fraud in fact, involving intentional wrong, it is difficult to conceive what circumstances would have amounted to fraud of that character. * * * It is therefore clear that whether the claim asserted by plaintiffs is regarded as one arising out of the deceit or fraud of the defendants, or as a debt created by fraud, the discharges in bankruptcy do not constitute a defense."

Ames vs. Moir, supra, was an action for fraud. Ames purchased from Moir 100 barrels of high wines, to be delivered to him upon call between certain dates, and to be paid for on delivery. Ames called for the high wines and got possession of them, when he knew himself to be insolvent, and with the intention not to pay for them. The evidence tended to show that he converted the wines to his own use without paying for them. It was held that he had committed positive fraud, involving moral turpitude, and that he was not released from the claim by his discharge in bankruptcy.

Forsyth vs. Vehmeyer, supra, was an action on a judgment recovered on a debt created by fraud. Forsyth falsely and fraudulently represented to Vehmeyer that he had on hand 200 cords of wood, which one Etheridge had contracted to purchase at $6 per cord. Forsyth had on hand only 40 cords of wood. By means of said false and fraudulent representations he obtained from Vehmeyer $200, which was to be repaid out of the proceeds of the sales of the wood. It was held, as stated in the syllabus:

"A representation as to a fact, made knowingly, falsely and fraudulently for the purpose of obtaining money from another, and by means of which such money is obtained, creates a debt by means of fraud involving moral turpitude and intentional wrong, and such debt is not discharged by a discharge in bankruptcy."

In *Noble vs. Hammond*, 129 U. S., 65, the court said:

"The effect to be given to the phrases 'while acting in a fiduciary character' and 'created by the fraud of the bankrupt' has been considered and fully settled by this court in the following cases: *Chapman v. Forsyth*, 2 How., 202; *Neal v. Clark*, 95 U. S., 704; *Wolf v. Stix*, 99 U. S., 1; *Hennequin v. Clews*, 111 U. S., 676; *Strang v. Bradner*, 114 U. S., 555; and *Palmer v. Hussey*, 119 U. S., 96. The class of debts held by the decisions in those cases to be excepted from the operation of bankrupt proceedings has been settled and illustrated with a clearness and fullness which leaves but little opening for any controversy with regard to the application of the clause under consideration to particular cases."

V.

Subdivision 4 of section 17 of the act of 1898, is substantially a re-enactment of a corresponding provision in the act of 1867, with the addition of the word "misappropriation."

For the purpose of comparison, we present, in parallel columns, section 17 of the act of 1898, and the provisions of section 33 of the act of 1867, which relate to debts excepted from the effect of a discharge:

Act of 1867.	Act of 1898.
Sec. 33. *And be it further enacted*, "That no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this act; but the debt may be proved, and the dividend thereon shall be	Sec. 17. Debts not Affected by a Discharge.—"A discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as (1) are due as a tax levied by the United States, the State, county, district or municipality in which he resides; (2) are judgments in

a payment on account of said debt."

Rev. Stat., section 5117: "No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy; but the debt may be proved, and the dividend thereon shall be a payment on account of such debt."

actions for frauds, or obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

In Loveland on Bankruptcy, section 293, the author says:

"*A discharge in bankruptcy does not release a bankrupt from debts which were created by his fraud or embezzlement. This is substantially a re-enactment of the provision of the act of 1867 in this regard.*"

Section 295:

"*It will be observed that clause 4 of section 17 is substantially a re-enactment of the provisions of the act of 1867, with the addition of the word 'misappropriation.'*"

In Lowell on Bankruptcy (p. 395), the author says:

"Clause 4 is substantially the same as sec. 5117 of the Revised Statutes (formerly sec. 33 of the act of 1867), except that the word misappropriation is added."

In the case of *In re* Basch, 97 Fed. Rep., 761 (D. court, S. D. N. Y.), Judge Brown said:

"The provisions of section 17 (4) of the present bankrupt act as to the debts excepted from the operation of the discharge are so nearly identical with the language of the pre-

ceding acts that these provisions must be deemed to be used in the sense adjudicated by the above decisions, so as not to except a debt or claim for a technical conversion or sale on commission, like the claim of the present creditor."

Speaking of subdivision 4, Mr. Collier, in his work on Bankruptcy (3d ed.), at page 198, says:

"In most respects this provision is similar to the provision under the act of 1867, with the exception of the use of the word 'misappropriation' which does not appear in any former act."

In Frey *vs.* Torrey, 73 N. Y. Supp., 201–203 (October, 1901), Justice McAdam said:

"*And subdivision* 4 *of said section of the statute is, in substance, a re-enactment of the analogous provision of the former act.* Coll. Banks (3d ed.), 198."

In the same case, in the appellate division, 75 N. Y. Supp., p. 40 (March, 1902), the court said:

"It is true that the provisions with reference to a discharge in bankruptcy under the present law are somewhat different from those of the former act of Congress; but we think the change has *restricted* rather than extended the effect of a discharge."

At this point, we desire to call the attention of the court to the fact that the manifest trend of bankruptcy legislation has been to *restrict* rather than enlarge the effect of a discharge. It will be noticed that each successive bankruptcy act passed by Congress has increased the classes of debts which are excepted from the operation of a discharge. In the bankruptcy act of 1800, no debts were expressly excepted. The act of 1841 excepted—

"Debts which shall have been created in consequence of a defalcation as a public officer, or as executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity."

The act of 1867 added to the class of debts which were excepted by the act of 1841, debts created by fraud or embezzlement. The act of 1898 added to the debts which were excepted by the act of 1867, debts created by misappropriation, and also the debts specified in subdivisions (1), (2), and (3) of section 17. The act of 1898 made a further addition to the classes of debts or liabilities which were not affected by a discharge, by omitting the provision contained in the act of 1867 allowing the assessment and proof of unliquidated damages for conversion. By referring to the amendments made in February, 1903, to the act of 1898, it will be seen that the classes of debts excepted from the effect of a discharge have been still further enlarged.

It will also be seen from the amendments that a discharge and release from any of his debts will be denied the bankrupt if he has committed any one of the various acts therein specified, and which, under the bankruptcy act of 1898, were not denounced or made a cause for the refusal of a discharge.

If it be true, as counsel for plaintiffs in error contend, that debts or liabilities created by the positive fraud or embezzlement of the bankrupt are barred by his discharge under the act of 1898, unless such debts or liabilities were incurred by him as an officer, or as an express trustee, then Congress *extended* rather than *restricted* the scope of a discharge by providing for the release of a *dishonest* bankrupt from liabilities created by his *fraud or crime.* This, we submit, Congress could not do without being chargeable with gross inconsistency and a reckless disregard of the plainest principles of justice and morality. A bankrupt law that could be used *as a shield for dishonesty, or a refuge for rascals, would be a reproach to the Congress that enacted it.*

Congress manifestly intended to except from the operation of a discharge the four classes of debts specified in subdivision 4 of section 17, namely: (1) debts created by fraud; (2) debts created by embezzlement; (3) debts created by misappropriation; and (4) debts created by the defalcation of an officer or express trustee.

VI.

When an act, or part of an act, which has received a judicial construction, is re-enacted in substantially the same terms, that construction must be considered to have the sanction of the legislature, unless the contrary appears. Mere change in the phraseology works no change in the established interpretation thereof, unless it clearly appears that such was the intention of the legislature.

In Black on Interpretation of Laws, 161, the author says:

"Where a statute has received a settled judicial construction, and is afterwards re-enacted by the same legislative power, in the same terms, or in *substantially the same language*, for the same purpose and object, it will be presumed that the legislature intended that the re-enacted law should have the same interpretation which was given to its original, and it will be construed accordingly, unless a contrary intention is very clearly shown. So also when terms or modes of expression are employed in a new statute, which had acquired a definite meaning and application in a previous statute on the same subject, or one analogous to it, they are generally supposed to be used in the same sense, and in settling the construction of the new statute regard should be had to the known and established interpretation of the former. Thus, in the federal bankruptcy act of 1841, it was provided that a discharge should not release debts which had been contracted by the bankrupt in a 'fiduciary capacity.'

"The same provision was repeated in the bankruptcy act of 1867, and it was held that these words were intended by Congress to bear, and should be construed by the courts to bear, *the same meaning which had been given to them by the judicial interpretations under the earlier law.*" (Cases cited in notes.)

In *Bradley vs. State*, 69 Ala., 318, Chief Justice Bricknell, delivering the opinion of the court, said:

"In the amendment, or revision, or in the re-enactment of statutes, changes of phraseology, the omission of words deemed superfluous, or the addition of words rendering the intention more clear, are not infrequent. The construction or operation of the statute is not varied because of such changes. Before the courts can pronounce that the law is changed, the legislative intention to change it must be evident. Language must be employed *which is not susceptible of any other construction.*"

In *Huddleston vs. Askey*, 56 Ala., 218, 220, it was said;

"In the adoption of the present statute the legislature is presumed to have known the construction the former statute received, and, so far as it was *substantially re-enacted*, to have adopted that construction. *Duramus v. Harrison*, 26 Ala., 326."

In *Posey vs. Pressly*, 60 Ala., 243, 249, it was said:

"It is obvious that, in the adoption of the present statute, the legislature had in view not only the former statute, but the judicial construction it had received. Whatever changes it was proposed to make, either in the statute or in its construction, are made in express terms and not left to inference."

In *McDonald vs. Hovey*, 110 U. S., 619, 628, Mr. Justice Bradley, delivering the opinion of the court, said:

"It is a received canon of construction, acquiesced in by this court—

"'That where English statutes, such, for instance, as the statute of frauds and the statute of limitations, have been adopted into our own legislation, the known and settled construction of those statutes by courts of law has been considered as silently incorporated into the acts, or has been received with all the weight of authority.' *Pennock v. Dialogue*, 2 Pet., 1, 18; Smith's Commentaries on Stat. and Const. Law, § 634; Sedgwick on Construction of Stat. and Const. Law, 363.

"And even where inadvertent changes have been made by incorporating different statutes together, it has been held not to change their original construction. Thus, in New Jersey, where several English statutes had been consolidated, a proviso in one of them, broad enough in its terms to affect the whole consolidated law, was held to affect only those sections with which it had been originally connected. Chief Justice Green said:

"'Where two or more statutes, whose construction has been long settled, are consolidated into one, without any change of phraseology, the same construction ought to be put upon the consolidated act as was given to the original statutes. A different construction ought not to be adopted if thereby the policy of the act is subverted or its material provisions defeated.' *In re* Murphy, 3 Zab., 180.

"So, upon a revision of statutes, a different interpretation is not to be given to them without some *substantial change of phraseology—some change other than what may have been necessary to abbreviate the form of the law.* Sedgwick on Const. Stat., 365. As said by the New York court for the correction of errors, in *Taylor v. Delaney*, 2 Caines Cas., 143, 150:

"'Where the law antecedently to the revision was settled, either by clear expression in the statutes, or adjudications on them, the mere change of phraseology shall not be deemed or construed a change of the law, unless such phraseology evidently purports an intention in the legislature to work a change.' And see Yates' Case, 4 Johns., 317; *Theriat v. Hart*, 2 Hill 380; *Parmelee v. Thompson*, 7 Hill 77; *Goodell v. Jackson*, 20 Johns., 693; *Croswell v. Crane*, 7 Barb., 191. 'The construction will not be changed by such alterations *as are merely designed to render the provisions more precise.*' *Mooers v. Bunker*, 29 N. H., 421.

"So the supreme court of Alabama has held that the legislature of that State in adopting the code, must be presumed to have known the judicial construction which had been placed on the former statutes; and, therefore, the re-enactment in the code of provisions *substantially* the same as those contained in a former statute *is a legislative adoption of their known judicial construction.* *Duramus v. Harrison*, 26 Ala., 326.

"'A change of phraseology in a revision will not be regarded as altering the laws where it had been well settled

by plain language in the statutes, or by judicial construction thereof, unless it is clear that such was the intent.' Sedgwick on Construction, 2d ed., 229, note."

In *Potter's Dwarris*, 181, note 2, it is said:

"An alteration in the phraseology, or the omission or addition of words in the revision of statutes, does not necessarily alter the construction of the act, or imply an intention to do so. Such intent must be evident, or the change in language palpable, before the courts will hold the construction to be changed. *Crowell v. Crane*, 7 Barb."

On page 274, note 4 (*id.*), it is said:

"Where the terms of a statute which has received judicial construction, are used in a later statute, whether passed by the legislature of the same State or country, or by that of another, that construction is to be given to the later statute. *Commonwealth v. Hartwell*, 3 Gray, 450; *Ruchmayboye v. Mottichmed*, 32 Eng. L. & Eq., 84; *Bogardus v. Trinity Church*, 4 Sand. Ch., 633; *Rigg v. Wilton*, 13 Ill., 15; *Adams v. Field*, 21 Vt., 256. It is to be presumed in such case that the legislature who passed the latter statute, knew the judicial construction which had been placed on the former one, and such construction becomes a part of the law."

In *Bishop on Stat. Crimes*, the author says:

SEC. 75. "The court, knowing the present law, knows also its history and the prior law. Such prior law, the legislature, being presumed to know it, must have had in mind in enacting the statute, therefore in the construction the court should take it into account, and this is, in general, specially essential."

SEC. 82 (p. 77). "* * * The interpreter should consider and take into the account what was the law before which Coke says is '*the very lock and key to set open the windows of the statute.*'"

In Yates' Case, 4 Johns. (Law), 318, 358, Chief Justice Kent said:

"The act of 1787 (*habeas corpus* act) followed the English statute verbatim, and the revised act of 1807, made only

some slight abbreviations in the mode of expression, which cannot, without violence, be construed to alter, in the least degree, the sense and settled construction of the former act. That the 'mere change of phraseology' in the revised laws was not to work a change in the established interpretation, was the unanimous decision of the court for the correction of errors in 1805, in the case of *Taylor v. Delancy* (2 Caines Cases in Error, 150, 151)."

In *Dominick vs. Michael*, 4 Sandf., 13 N. Y., 374, 409, it is said:

"For nearly half a century it has been a cardinal and controlling maxim, that in the construction of a revised act, *a mere change in the language* shall not be regarded as evidence of an intention to vary the construction, unless the change is such as to render *that intention manifest and certain*. (Chief Justice Spencer in *Taylor v. Delancy*, 2 Caines Cases in Error, 151; Chancellor Kent in *Goodhill v. Jackson*, 20 Johnson, 722.) It was in the court of errors that a rule of interpretation so eminently judicious was first established, and although cases may have occurred in which it has been violated, it has certainly never been reversed or abandoned. It is now the rule, which, as judges, we are bound to follow, and we add that it is especially in the construction of the Revised Statutes, where the changes in phraseology are so frequent as to have changed entirely the outward form of the acts which are revised, that the observance of the rule is a necessary and paramount duty. Its abandonment or frequent violation would open a perennial source of confusion, uncertainty and litigation."

In "The Devonshire," 13 Fed. Rep., 39, it is said:

"Where a statute has received a judicial construction and is afterwards re-enacted by the legislature of the same or another country, it is presumed to have been passed as construed."

In *Reiche vs. Smythe*, 13 Wall., 162, it is said:

"Congress having, therefore, defined the word in one act, so as to limit its application, how can it be contended that

the definition shall be enlarged in the next act on the same subject, when there is no language used indicating an intention to produce such a result? Both acts are *in pari materia*, and it will be presumed that if the same word be used in both, and a special meaning were given it in the first act, that it was intended it should receive the same interpretation in the later act, in the absence of anything to show a contrary intention."

In *Willis vs. Eastern Trust & Banking Co.*, 169 U. S., 295, 307, it is said:

"This provision, as incorporated in the act of Congress, *though somewhat condensed in form, is essentially in the same words and of precisely the same meaning, as the provision of the statute of Massachusetts.* While it omits the words 'the lessee of lands or tenements, or a person holding under such lessee,' it still, like the Massachusetts statute, in cases where there is neither forcible entry nor detainer, is restricted to cases in which 'the lease' has been determined, and differs in this respect from the provision in the first section of the act of Congress, which defines tenancies by suffrance.

"The resemblance between the provisions of the Massachusetts statute of 1860, and of the act of Congress of 1864, *is so remarkable, that it is evident that the latter were taken from the former. This being so, the known and settled construction which those statutes had received in Massachusetts before the original enactment of the act of Congress must be considered as having been adopted by Congress with the text thus expounded.*"

In *Commonwealth vs. Hartnett*, 3 Gray, 450, Judge Metcalf, in the opinion, said:

"It is a common learning, that the adjudged construction of the terms of a statute is enacted, as well as the terms themselves, when an act, which has been passed by the legislature of one State or country, is afterwards passed by the legislature of another. So when the legislature, in a later statute, use the terms of an earlier one which has received a judicial construction, that construction is to be given to the later statute. And this is manifestly right. For if it were intended to exclude any known construction of a previous statute, the legal presumption is, that its terms would be so

changed as to effect that intention. 6 Dane Ab., 613; *Kirkpatrick v. Gibson's Ex'ors*, 2 Brock., 388; *Pennock v. Dialogue*, 2 Pet., 18; *Adams v. Field*, 21 Vt., 286; *Whitcomb v. Rood*, 20 Vt., 52; *Rutland v. Mendon*, 1 Pick., 156; *Myrick v. Hasey*, 27 Maine, 17. * * * We are of the opinion that the purpose and intent of St. 1804, c. 143, sec. 6, and of the Rev. Sts., c. 126, sec. 14, were the same as the purpose and intent of St. 12 Anne, c. 7, and that they must have the same construction which was given to that before these were enacted."

In *State ex rel. vs. Cornell*, 75 Fed. Rep., 25, it is said:

"It has been frequently asserted that in case the legislature adopts the construction which it had already received by the highest courts of such State, and by a parity of reasoning, *where a law is re-enacted by a legislature, which has been interpreted by the supreme court of the same State such construction is thereby adopted.*"

VII.

A discharge in bankruptcy, under the act of 1898, does not release a bankrupt from debts created by his positive fraud involving moral turpitude or intentional wrong.

Section 17 of the bankruptcy act of 1898 is as follows:

"A discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as (1) are due as a tax levied by the United States, the State, county, district or municipality in which he resides; (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

Opposing counsel contend that a claim for damages arising from "frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another," is released by a discharge in bankruptcy, unless the claim is "merged in judgment." Section 17 of the bankruptcy act provides:

"A discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as * * * (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another."

If counsel's contention be sound, then the bankrupt has the power to nullify the provisions of subdivision (2), except as to judgments obtained before the commencement of proceedings in bankruptcy. This, we think, will be readily seen when the provisions of section 11*a* are considered. Section 11*a* is as follows:

"A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined."

After a person has committed a fraud, or has obtained property by false and fraudulent representations, or has committed a willful and malicious injury to the person or property of another, and an action has been brought against him to recover damages resulting from such fraud or injury, then, all he need do, in order to escape from liability, if counsel's contention can be sustained, is to file a petition in bankruptcy, obtain a stay under the provisions of section 11*a* until he obtained his discharge, and then plead his dis-

charge as a bar to the claim. If a judgment should be entered after the filing of the petition it would be entered simply because the bankrupt did not avail himself of the provisions of section 11*a*. That this is, undoubtedly, also the view of counsel for plaintiff in error is shown by their statement that the "judgment, in order to be within the exception, must have been * * * perhaps, before the commencement of proceedings in bankruptcy."

It will be noted that in subdivision 2 of section 17 there is no limit as to the time within which the judgment must be obtained in order to bring it within the exception. A judgment in an action for fraud, etc., entered either before or after the proceeding in bankruptcy is commenced, is excepted from the operation of a discharge. Now can it be supposed that Congress intended to allow "actions for frauds or obtaining property by false pretenses or false representations or for willful and malicious injuries to the person or property of another" to be stayed until the bankrupt could obtain his discharge, and to make such discharge a bar to the action? Is it supposable that it was the intention of Congress to put it in the power of the bankrupt to thus render the provisions of subdivision 2 practically inoperative? Our views as to the results which would follow from counsel's contention find confirmation in the methods adopted by plaintiffs in error in the case at bar, if the statement of their counsel is to be taken as true. They say (p. 70): "It appears that an order of stay was granted by the Federal court in the case at bar." If that be true, then the plaintiffs in error obtained a stay with the view of preventing the defendant in error from obtaining a judgment until after they had obtained their discharge. Counsel further say:

"Inferentially, it (the stay) must have been granted upon the theory that the demand of the defendant in error is one from which a discharge would be a release."

But why say "inferentially"? If they obtained a stay they surely know on what "theory" it was granted, and they should have stated what that theory was, instead of stating their inference as to what it was. Counsel's statement justifies the conclusion that they attempted to obtain a stay under the provisions of section 11. We may, however, say here that there is not a word in the record to show "that an order of stay was *granted* by the Federal court." If one was granted, the plaintiff in error was not served with notice, nor did he know, that an application for a stay would be made. To have obtained a stay without his knowledge, or without giving him an opportunity to be heard, might be termed "sharp practice," *if not something worse*, although in the case at bar it might have been expected, because consistent. Then again, if a stay was granted it could not have been granted on counsel's "theory," because Judge Kohlsaat distinctly held in the case of *In re* Wollock, 120 Fed. Rep., 516, to which we will refer later on, *that a debt or claim created by positive fraud is not barred by a discharge in bankruptcy.*

In re Thomas (U. S. district court, Iowa, April, 1899), 92 Fed. Rep., 912, was an application of a bankrupt for his discharge. A creditor filed specification of grounds in opposition to the discharge.

Woolson, district judge, said:

"That the debt was created by *fraud* of the bankrupt, if such be the case, is not ground for refusal of discharge under the statute. Section 17 provides that from *debts so created a discharge does not release the bankrupt.* And when the discharge is pleaded as a defense to the enforcement of such debt, proof that the *debt was so created* makes the discharge inoperative against it. But the statute does not justify withholding the discharge therefor. Collier in his excellent treatise on Bankruptcy, says (page 135, 1st ed.): * * * 'The mere fact that the only debt is one which the discharge will not affect—for instance, that it was due from the debtor in a fiduciary capacity, *or was created by his fraud*—is no

reason for refusing the discharge. The question how the discharge affects particular debts is to be determined by the court in which the bankrupt may be sued upon the debt, should the bankrupt in that suit interpose the discharge as a defense.'"

In the case *In re Blumberg*, 1st Am. B. R., page 633 (March, 1899, U. S. district court, Tenn.), Judge Clark, referring to section 17 of the bankruptcy act of 1898, said:

"It is not doubted that the purpose of this statute *is the same as a similar provision found in the former bankruptcy law*, and that the word fraud means moral turpitude or intentional wrong, and that *a part of the purpose of the statute was to discourage and punish such moral turpitude or intentional wrong.* There is, of course, a difference in the phraseology between the former and the present statute, the former law designating the debt as one created by fraud or embezzlement, etc., while, as will be observed, the language of the present act is 'judgments in actions for fraud, etc.' Under the original bankruptcy law it was not, and could not be doubted that the debt which could not be discharged was one based upon the fraud and the injury resulting from such fraud, the fraud itself being the foundation of the right and of the recovery, if a recovery was had. *In my opinion there is nothing in the present statute to warrant the conclusion that any different meaning is to be attached to the language used.*"

In re Black, 97 Fed. Rep., 493 (dist. court, N. D. California, Nov., 1899), De Haven, district judge, said:

"The bankruptcy act provides (section 17) that a discharge *shall not affect any debt created by the fraud of the bankrupt*, but the question whether there was fraud in the creation of any particular debt is one which the court of bankruptcy is not authorized to adjudicate in passing upon the bankrupt's application for discharge. That question is one which can only be determined in an action by the creditor for the recovery of such debt when the discharge in bankruptcy is pleaded in bar. In such an action and in answer to such a plea, the creditor would have the right to show that the debt sued for *was created by fraud*, and *therefore not affected by the discharge*. *In re Thomas* (D. C.), 92 Fed., 912."

In re Basch, 97 Fed. R., 761 (November, 1899, D. court, S. D. N. Y.), application for stay of proceedings in State court, Brown, district judge, said:

"The provision of section 17 (4) of the present bankruptcy act as to the debts excepted from the operation of the discharge, *are so nearly identical with the language of the preceding acts*, that these provisions must be deemed to be used in the sense adjudicated by the above decisions, so as not to except a debt or claim for a technical conversion or sale on commission, like the claim of the present creditor."

In re Lewensohn (U. S. dist. court N. Y., Jan., 1900), 99 Fed. Rep., 73 (cited by plaintiff in error), was an application for a stay of proceedings on *warrants which had been issued for his arrest* in an action brought against him in the State court for obtaining goods by false pretenses.

Brown, J., said:

"2. *Nor is there any doubt that if the charges of false representations are sustained, these debts would be barred from the operation of the discharge by subdivision 2 of section 17, or by subdivision 4 of the bankruptcy act.* * * * If a judgment is necessary to prevent the discharge from barring the debt, a prosecution of the suit to judgment should be allowed; since *the essential nature of the claim, if the charges of false representation are sustained, makes it one which evidently was not designed to be barred.*"

In the case *In re* Steed (D. C. North Carolina, April, 1901) 107 Fed. Rep., 682, 684, Judge Purnell said:

"*If the debt is created by fraud, the bankrupt is not discharged therefrom.* Section 17, cl. 4."

In Loveland on Bankruptcy, it is said:

"SEC. 293. *A discharge in bankruptcy does not release a bankrupt from debts which were created by his fraud or embezzlement. This is substantially a re-enactment of the provision of the act of 1867 in this regard.* The effect to oe given to this phrase was considered and fully settled by the su-

preme court in cases arising under the former act. * * * Where the claim is for damages on account of actual fraud or deceit, practiced by the debtor, the claim is not barred by a discharge" (*Strang v. Bradner*, 114 U. S., 555; *Ames v. Moir*, 138 U. S., 306; *Hughes v. Oliver*, 8 Pa. St., 426; *Morse v. Hutchins*, 102 Mass., 439; *Stokes v. Mason*, 10 R. I., 261).

"A debt is not barred by a discharge where goods are purchased with the intention of never paying for them, or by fraudulent representations at the time" (*Stewart v. Emerson*, 52 N. H., 301; *In re Devoe*, 1 Lowell, 251).

"SEC. 295. It will be observed that *clause 4 of section 17 is substantially a re-enactment of the provision of the act of 1867, with the addition of the word 'misappropriation.'*"

Judge Lowell, in his work on Bankruptcy, says:

"SEC. 433. *The recent statutes except from the operation of the discharge, debts which have been fraudulently 'created' or 'incurred;'* the former word was used in our statute of 1867, and the latter in the English laws of 1869 and 1893."

On page 488 the author says:

"It is incredible that Congress should intend to release the debtor from liability for a tort, but not from liability on a judgment for tort."

In Collier on Bankruptcy (3d ed.), 200, it is said:

"See *Forsyth v. Vehmeyer*, decided by the Supreme Court, April, 1900, 3 Am. B. R., 807; 177 U. S., 177, which, while having reference to the statute of 1867, *is also equally applicable to the present statute.* In that case it was held that a representation as to an act made knowingly, falsely, and fraudulently for the purpose of obtaining money from another, and by means of which such money is obtained, creates a debt by means of a fraud involving moral turpitude and intentional wrong, and is non-dischargeable."

Again, at page 202, the author says:

"*Under the provisions of section 17, subdivision (4), a debt created by fraud is not released.*"

At page 345 the author says (1st ed.):

"We think it will be conceded that there is in principle no more reason for releasing a tort feasor from the amount due to another as damages, when it has been liquidated by some special mode of assessment, than when it has been liquidated by a judgment. The reason for making a discharge in bankruptcy no release of a judgment in an action for any of the torts mentioned in section 17 (2) is because of the nature of the debt—because of the element of wrong existing in it—and not because that claim has been put into the form of a judgment."

The case of Bracken *vs.* Milner (U. S. circuit court, Mo., Oct., 1900), 104 Fed. R., 522, was so thoroughly considered that we feel justified in quoting from the opinion quite at length. The 3d syllabus is as follows:

Syll. 3. "Bankruptcy—Debt created by fraud.—An agent intrusted with money of his principals to be loaned on real estate security made such a loan, taking as security a trust deed to his partner as trustee. This deed he afterwards caused to be foreclosed, and bid in the property in his own name, but without paying therefor, and received a deed from the trustee. He made no report of the transaction to his principals, but subsequently conveyed the property away, and retained the proceeds. *Held*, that the transaction was outside of and in violation of his agency, and his liability to his principals resulting therefrom was a debt created by fraud, within the meaning of bankr. act 1898, sec. 17, subd. 4, from which he was not released by a discharge in bankruptcy."

In the opinion delivered by Judge Phillips he said:

"The plaintiffs for many years past were resident citizens of the State of Ohio. They had known the defendant from his boyhood, and had the utmost confidence in his personal integrity and business capacity. Shortly after the civil war he located in the city of Springfield, Mo., and plaintiffs, who were partners in the mercantile business, and J. P. Bracken in his individual capacity, made arrangements with the defendant to loan money for them in Southwest Missouri, secured

by mortgages or deeds of trust on real estate. The defendant was to loan at given rates of interest, and report the description and quality of the land tendered as security to the plaintiffs for their approval. The notes taken for loans were to be executed to the plaintiffs, or whichever of them was making the loan, and the notes and deeds of trust were to be sent by defendant to them. The defendant was to look to the borrowers alone for his commission for services. He was to collect the annual interest for the plaintiffs, and look after the securities and the collections, and remit promptly to the plaintiffs all collections. Beginning back in the 80's plaintiffs sent him money under this arrangement, which they continued to do until some time early in the 90's. In some of the deeds of trust taken by the defendant his name was inserted as trustee, and in some of the loans made by him for plaintiffs other persons were made trustees in the deeds of trust. Beginning perhaps as far back as 1884, payments of annual interest due under the loans were not paid promptly, according to the defendant's reports by letter to the plaintiffs. These delinquencies increased as time wore on, and upon inquiries made by plaintiffs of the defendant as to the cause thereof, he wrote them various excuses and explanations, making them occasional remittances to quiet their importunities. But matters grew worse, until in 1894 and 1895 the defendant almost ceased to make any replies to plaintiffs' repeated inquiries of him; and in June, 1895, one of the plaintiffs went to Springfield, Mo., to investigate these matters. After pressing the defendant for explanations for two or three days, he admitted that he had collected the moneys sued for in these actions at various times prior thereto, and had appropriated the same to his own use in private transactions, with the expectation that some favorable turn would take place in his fortunes which would enable him to make restitution. * * *

"Prior to the institution of these suits, the defendant, Milner, on his voluntary petition, was adjudged a bankrupt. He reported these claims sued on in his schedules as among his liabilities. Having received his final discharge in bankruptcy, he pleaded the same as a release from the claims sued on. He also interposes the plea of the statute of limitations."

"The controlling question in this case is the effect of the discharge in bankruptcy on the claims sued for, and involves

the construction of *subdivision* 4, sec. 17, bankr. act, which declares that a 'discharge in bankruptcy shall release the bankrupt from all of his provable debts, except such as were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.' The conduct of the defendant in respect to his stewardship is so reprehensible that at the hearing of this case the inclination of my mind was to hold him liable on all of these claims. But an examination of the rulings of the supreme court on kindred statutes has unsettled these first impressions. The question turns upon the proper construction of the words 'defalcation while acting in any fiduciary capacity.'"

After reviewing the authorities, Judge Phillips said:

"Applying these authoritative principles to this case, what was the character of Milner in respect to his default in failing to remit the moneys collected by him in those cases, where the collections *were not made under foreclosure of the deeds of trust in which he was trustee?* In such case his authority to collect did not arise from any provisions or recitations in the deeds of trust, but simply by virtue of his agency under the contract to collect the interest and principal, and remit the same to the plaintiffs. Was there any more special trust and confidence reposed in him than that reposed by any principal in the agent selected to take his money for investment in approved securities, look after the same, and attend to the collections for him? He was simply under contract obligation to remit as fast as collected. The defendant did not misapply the money sent him. He loaned it on approved securities. His default arose *on failure to remit*, as a mere *agent*, in some of the cases sued on. The court, therefore, holds that in respect of the collections made by the defendant *independently of his trusteeship* in the deed of trust, and in the absence of *positive fraud* his liability therefor is released by his discharge in bankruptcy.

"A different question arises in the instance where the defendant was trustee in some of the deeds of trust, which he of his own motion foreclosed, and appropriated the money arising from the sales. He did not report to plaintiffs, or either of them, the facts of such sales and the receipt of the money arising therefrom. On the contrary, he concealed

these facts from the beneficiaries in the deeds of trust, and led them, by his letters, to believe that the debtors were delinquent, and the deeds of trust were in force. He had himself made trustee in certain of the deeds of trust, and thereby accepted the office. As such he was trustee of an *express trust*, and was therefore acting under a *technical trust* created by an instrument of writing. His duties as such trustee were clearly defined by the instrument, which empowered him to sell the mortgaged premises, in case of default, to the highest bidder, for cash at public vendue; and on the payment of the purchase money he was to 'receive the proceeds of sale, out of which shall be paid, first, the cost and expenses of this trust, and next, all amounts expended as aforesaid, for taxes and other purposes, with interest as above mentioned, and next, the amount that may remain unpaid on said note and interest thereon; * * * and the said party of the second part (the defendant) covenants faithfully to perform and fulfill the trust herein created.' He received the money under the foreclosure sales as a *technical trustee*, and was bound by his office as such to pay over to the *cestui que trust*, 'the amount that may remain unpaid on said note.' In other words, he received such money while acting, in the strictest sense, *in a 'fiduciary capacity.'* His liability, therefore, on these causes of action is not released by his discharge in bankruptcy. In this category are the collections made by him under the deeds of trust given by Giles P. Newbill and George B. Ramsay. While he was trustee under the deed of trust given by Jeffries, his collection of the debt thereby secured was not as trustee by foreclosure. It was paid to him voluntarily by Jeffries as the recognized agent of the plaintiffs, and therefore comes within the class of cases first discussed in this opinion.

"A *different question* is presented in respect of what is known as the Neighbors' transaction. On February 16, 1881, the defendant loaned for the two Brackens the sum of $550 to W. D. Neighbors, secured by a deed of trust on real estate, executed to John W. Lisenby as trustee. This deed of trust he caused to be foreclosed by the trustee, and at the sale thereunder, on the 28th day of July, 1882, he bid in the land in his own name at $500. But for some unexplained reason the trustee's deed was not made to him until the 23d day of February, 1889. There is no pretense that the defendant paid the $500 to the trustee. *This dealing he never*

reported to plaintiffs, but persistently kept the fact concealed from them, and led them to believe that the deed of trust continued in force until the visit of one of the plaintiffs, in June, 1885, when he stated that he had 'traded the land off' in 1887 or 1888. What he got in exchange does not appear. This transaction was clearly *outside of his agency.* Conceding that it was permissible, for properly guarding the interests of his principals to bid the land in at trustee's sale, he should have done so in their name, and had the deed made to them; or having bidden it in in his own name, *he should have reported the transaction to plaintiffs,* and sent them the $500, subject to their approval. This whole transaction is further characterized by the fact that Lisenby, trustee in the deeds of trust, was at the time the defendant's partner in business. Therefore, the transaction stands in its *moral* aspects little different from its *legal* effect had the defendant's own name been inserted as trustee. The result is that plaintiffs lost their security and the money. The thing, whatever it was, he got in exchange for the land, is gone, so that the plaintiffs are unable to fix upon it an equitable lien. *The property did not come into his hands as agent, but in violation of his duty as agent.* The whole manner of depriving plaintiffs of their security and money was *mala fides,* a *gross and positive fraud, within the meaning of the term 'fraud' employed in section 17, subd. 4, of the bankrupt act,* and defendant's liability for damages resulting therefrom is *not released by his discharge in bankruptcy.*

"In respect of the statute of limitations pleaded by defendant in those actions, it is sufficient to say that under section 4290, Rev. St. Mo., 1899, it is provided that 'if any person, by absconding or concealing himself, or by any other improper act prevent the commencement of an action, such action may be commenced within the time herein limited after the commencement of such action shall have ceased to be so prevented.' As already shown, this defendant did not only conceal from the plaintiffs the fact of his having collected this money while they were residing in a distant State, but by his letters and whole conduct he purposely led them to believe that the debts had not been collected or the mortgages foreclosed. In such case the plaintiffs had five years in which to bring the action after the discovery of the fraud. The discovery was not made until June, 1895, and the suits were brought in March, 1900. * * *

"Judgment will go against the defendant for the amount of the *defalcation* on the Ramsay and Newbill debts, and for the *balance* due on the Neighbors' debt, after allowing a proper credit for the Arkansas land."

In the above case there were three classes of claims against the defendant.

1. Claims arising out of transactions in which the defendant was *trustee of an express trust*. As this was a *technical trust*, within the meaning of the bankruptcy act, thedefendant's discharge in bankruptcy did not release him.

2. Claims for money which the defendant received, simply as the agent of the plaintiff, and which he had failed to remit. Following the decisions rendered under the act of 1867, in cases of like character, the court held that as to those claims the defendant's discharge was a release.

3. A claim arising out of a transaction (the Neighbor's transaction) in which the defendant was not acting as the *trustee of an express trust*. The court held that the facts and circumstances connected with the transaction showed that the defendant's conduct "was *mala fides, a gross and positive fraud*, within *the meaning of the term 'fraud' employed in section 17, subd. 4, of the bankrupt act*," and that therefore his discharge was not a release of the claim.

Milner was guilty of fraudulent concealment, of making false and fraudulent representations, and of fraudulently appropriating the property of another to his own use. The defendants in the case at bar were *repeatedly* guilty of acts of a like character, from the consequences of which they are now seeking refuge under a law which was enacted for the relief of the "*honest* but unfortunate debtor."

In re Cole, 106 Fed. R., 837 (district court N. Y., March, 1901), was an application to stay proceedings in an action

brought against the bankrupt in the State court. In the course of the opinion Judge Hazel said:

"This is an application to stay proceedings in an action brought against the bankrupt in the supreme court of the State of New York. The pleadings in that action come before me as part of the motion papers. It is admitted on argument that the action is brought *to recover damages for an alleged fraud.* It also appears that the action is now on the day calendar of the supreme court of this State at Buffalo, and plaintiff is pressing a trial. The petitioner was adjudicated bankrupt on his own petition on the 8th day of March, 1901, after the action now sought to be stayed was on the calendar of the court for trial. The schedule of the bankrupt lists the claim of the plaintiff in the pending action for fraud, and refers thereto as 'an alleged claim against petitioner and others, growing out of transactions in real estate, which said claim is unliquidated, and is contested by petitioner.' It is claimed by the plaintiff in her complaint that the bankrupt has, by fraudulent representations, defrauded her out of certain real estate in the complaint described, to her damage of $8,000. If plaintiff is permitted to proceed, and is successful in securing a judgment, it is clear that her judgment would not be dischargeable in bankruptcy under Bankr. act, sec. 17, subsec. 2. It is strongly urged that the claim as set out in the schedule is provable, and is not within the exceptions mentioned in section 17, and that it may be liquidated by order of this court as provided by section 63*b*; that this claim or debt is as yet simply a cause of action, if anything, and, not having been reduced to judgment, could be proved and is dischargeable in bankruptcy. I have examined *In re Rhutasel* (D. C.), 96 Fed., 597, and other authorities cited by counsel, *but I am unable to convince myself that Congress intended that a claim of this nature—one arising from the fraud of the bankrupt—is dischargeable in bankruptcy, when concededly a judgment for a claim of this character is not released by a discharge.* I am disposed to agree with the opinion of Judge Brown, as expressed *In re Lewensohn* (D. C.), 99 Fed., 73: 'If a judgment *is necessary* to prevent discharge from barring the debt, a prosecution of the suit to judgment should be allowed, since *the essential nature of the claim, if the charges of false representation are sustained, makes it one which evidently was not designed to be barred.*' The case of

Burnham v. Pidcock, 5 Am. Bankr. R., 42, 66 N. Y. Supp., 806, and the views therein expressed, do not seem at variance with this determination. In that case the claim sought to be exempted from the operation of the discharge was upon a *judgment* obtained in an action for conversion, and the court said that it is not necessarily one rendered in an action either for fraud or wilful and malicious injuries to the person or property of another, within the meaning of the act."

Frey *vs.* Torrey, 73 N. Y. Supplement, 201, was decided at the appellate term of the supreme court in October, 1901. The opinions delivered in the case are as follows:

"GILDERSLEEVE, *J.*:

"The action is brought to recover the amount deposited by the plaintiff with the defendant, who was a private banker, which deposit was, according to the plaintiff, received by the said banker, although the latter knew he was insolvent at the time of receiving such deposit. The answer is a general denial and a discharge in bankruptcy. The justice gave judgment for the plaintiff for $162.05 damages and costs. The defendant appeals.

"The defendant was a private banker, with whom plaintiff had been making deposits for more than a year. His last deposit was on October 11, 1898. On October 4, 1898, the plaintiff's total balance with defendant was $1.19, but on October 5th, 6th, 7th, 10th, and 11th he deposited sums aggregating $150. However, during the aforesaid days of October, 1898, he withdrew sums aggregating $28, so that at the close of business on October 11th he had a balance of $123.19, of which $122 had been deposited by the plaintiff and received by the defendant as such private banker. Subsequently, on October 4, 1898, other checks were drawn by the plaintiff on the defendant on October 10th, and payment refused, although the amounts were within the limit of the plaintiff's balance with the defendant. No part of the balance of $123.19 has been paid by the defendant, although duly demanded. On October 13, 1898, the defendant made a general assignment for the benefit of creditors. The assignee only succeeded in collecting about $600 of assets. The plaintiff introduced considerable evidence, both documentary and oral, tending to show that defendant was insolvent

at the time that said deposits were made, and that he accepted them with full knowledge of his own insolvency, while carefully concealing the fact from the plaintiff. There is much dispute as to the facts, but there is sufficient evidence to uphold the finding of the justice in the plaintiff's favor. By accepting such deposits, under the circumstances disclosed, the defendant was guilty of fraud. *Cassidy v. Uhlmann*, 54 App. Div., 208; 66 N. Y. Supp., 670; *Cragie vs. Hadley*, 99 N. Y., 135; 1 N. E., 537; 52 Am. Rep., 9; *Blair vs. Hill*, 90 App. Div., 33; 63 N. Y. Supp., 670. *His discharge in bankruptcy did not relieve him from a debt founded on fraud. Bankr. act, § 17, subd. 4.* Nor, by proving his claim against the defendant in the bankruptcy proceeding, did the plaintiff waive his right to bring this action. *Ewart v. Schwartz*, 48 N. Y. Super. Ct., 390; *Stokes v. Mason*, 10 R. I., 261. The numerous authorities cited by the defendant's counsel do not seem to apply to the circumstances of the case at bar.

"The judgment, upon the whole case, should be affirmed, with costs.

"Freedman, P. J., concurs.

"McAdam, J. (concurring). Although a literal reading of subdivision 4 of section 17 of the bankruptcy law causes a doubt to arise as to whether debts created by the fraud of a bankrupt who is not an officer or one acting in a fiduciary capacity are unaffected by his discharge (*In re* Lewensohn [D. C.] 3 Am. Bankr. R., 596, 99 Fed., 73), a careful reading of that subdivision in the light of former bankruptcy acts indicates that such debts are not affected by a discharge in bankruptcy. A reference to the former statutes is instructive as showing the development of the scheme of exemption from the operation of the law. There was no express provision for exemption in the act of 1800 (2 Stat., 19). By the act of 1841, § 1 (5 Stat., 440), the debts not released by a discharge were 'debts created in consequence of a defalcation as a public officer; or as executor, administrator, guardian or trustee, or while acting in any fiduciary capacity.' The act of 1867 (14 Stat., p. 533, § 33) provided:

"'No debt created by the fraud or embezzlement of the bankrupt or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this act; but the debt may be proved, and the dividends thereon shall be a payment on account of said debt.'

"It will be noticed that the last-mentioned statute adds

fraud or embezzlement of the bankrupt, who may not be a public officer or occupy a fiduciary relation, to the cases provided for by the act of 1841.

"That part of the present act devoted to exemptions (section 17) not only provides for cases of fraud, but for other torts (subdivisions 2, 4), and also makes the discharge inoperative as to taxes (subdivision 1), and as to claims not scheduled in time, unless the creditor had actual knowledge or notice of the proceedings in bankruptcy. Under the act of 1867 doubts arose whether a judgment for fraud by merger of the original debt did not make the bankrupt's discharge operative upon the debt. *In re* Lewensohn, *supra*. Apparently to dispel such doubts, subdivision 2 of section 17 of the present statute was enacted, providing that the bankrupt's discharge shall not release him from provable debts which are 'judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another.' And subdivision 4 of said section of the statute is, in substance, a re-enactment of the analogous provision of the former act. Coll. Bankr. (3d ed.) 198. It appears to have been the legislative intent to prevent bankruptcy from being interposed as a shield against fraud, irrespective of the fact whether the creditor has obtained a judgment for the fraud or not.

"Judgment affirmed, with costs."

Frey vs. Torrey, 75 N. Y. Supplement, p. 40 (appeal from the Appellate Term to the Appellate Division Supreme Court), was decided March 7, 1902. It is apparent that the case was carefully considered. In a well reasoned opinion, fully supported by the authorities cited, Laughlin, J., said:

"The pleadings in the municipal court were oral. The record shows that the complaint was 'for money obtained by fraud.' The answer was a general denial and a plea of discharge in bankruptcy. The defendant was a private banker, and between the 5th and 11th days of October, 1898, the plaintiff deposited with him the sum of $150. The balance of this deposit standing to the credit of the plaintiff on the last-mentioned date was $123.19, no part of which has been paid. The action was brought to recover that sum,

On the 13th day of October, 1898, the defendant made a general assignment for the benefit of his creditors, which was filed the next day; and on the 17th day of December thereafter, on the petition of his creditors, he was duly adjudged a bankrupt by the United States district court. In the bankruptcy proceedings the plaintiff filed proof of a claim in the said amount 'for money deposited' with the defendant 'while acting in the capacity of banker.' On the 29th day of March, 1899, the defendant was duly discharged by said court from all debts provable in bankruptcy which existed on the day he was adjudged a bankrupt, 'excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.'

"The appellant, without conceding fraud on his part in contracting this indebtedness, rests his appeal solely upon the grounds: (1) That respondent, having proved his debt upon contract, waived his right to recover upon the ground of fraud; and (2) that, even if there was actual fraud on his part, still the debt has been discharged by the discharge in bankruptcy. The trial court and the appellate term have determined that there was fraud on the part of appellant in receiving these deposits when he was hopelessly insolvent. We do not deem it necessary, inasmuch as the appellant has not seen fit to present the point, to scrutinize the evidence, in the light of the decisions applicable, for the purpose of determining whether a finding that positive fraud, involving moral turpitude or intentional wrong, might be inferred therefrom. The effect of the discharge in bankruptcy must be determined by a consideration of the bankruptcy act of July 1, 1898, and the decisions thereunder, and those construing the corresponding provisions of the former bankruptcy laws. Section 17 of the present bankruptcy law, so far as material to our inquiry, provides as follows:

"'A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another; * * * or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.' 30 Stat., 550.

"The provisions of the bankruptcy act of 1867 corresponding with the two subdivisions quoted, so far as that act con-

tained provisions on the subject, were embraced in section 33 of the act of 1867, which is the same as section 5117 of the United States Revised Statutes, which provided as follows:

"'No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy.'

"The appellant contends that the words 'while acting as an officer or in any fiduciary capacity,' in subdivision 4 of section 17 of the act of 1898, related not only to 'defalcation,' but also to the words 'fraud,' 'embezzlement,' and 'misappropriation.' In other words, he contends that debts created by fraud are not necessarily dischargeable in bankruptcy, but that the fraud must have occurred while the defendant was acting as an officer or in some fiduciary capacity. This was neither the grammatical nor judicial construction of section 5117 of the United States Revised Statutes. *Sheldon v. Clews*, 13 Abb. N. C., 41; *Bradner v. Strang*, 89 N. Y., 299, affirmed in *Strang v. Bradner*, 114 U. S., 555, 5 Sup. Ct. 1039, 29 L. Ed. 248; *Schroeder v. Frey*, 60 Hun, 58, 14 N. Y. Supp., 71, affirmed in 114 N. Y., 209, 21 N. E., 119; *Stokes v. Mason*, 10 R. I., 261; Brandon, Bankr. (2d ed.), 272.

"The construction of subdivision 4 herein quoted has been frequently discussed judicially, but we find no controlling precedent. The view presented by appellant seems to have been adopted by the appellate division in the fourth department *In re* Bullis (73 N. Y. Supp., 1047), but the construction of subdivision 4 was not essential to the decision in that case. The question there was whether a judgment had been discharged by a discharge in bankruptcy of the judgment debtor, and the point decided was that the judgment had been recovered in an action for fraud, and therefore was excepted from the operation of such discharge by subdivision 2 of said section 17. It is true that the provisions with reference to a discharge in bankruptcy under the present law are somewhat different from those of the former act of Congress; but we think the change has restricted rather than extended the effect of a discharge. Subdivision 2 of section 17 excepts from the discharge judgments for willful and malicious injuries to the property of another. There was no similar exception in the former statute. Under the construction of the former bankruptcy

law, causes of action against factors, agents, commission merchants, bailees, and auctioneers for conversion or misappropriation of funds of property were discharged, it being held that the debts for fraud not dischargeable were those where there was actual positive fraud as distinguished from implied or constructive fraud, and that the debts created by defalcation, while acting in a fiduciary character, embraced, only those debts incurred by a breach of a technical, as distinguished from an implied, trust (*Lawrence v. Harrington*, 122 N. Y., 408, 25 N. E., 406; *Mulock v. Byrnes*, 129 N. Y., 23 29 N. E., 244; *Hennequin v. Clews*, 77 N. Y., 427, affirmed in 111 U. S., 676, 4 Sup. Ct. 576, 28 L. Ed. 565; *Neal v. Clark*, 95 U. S., 704, 24 L. Ed., 586; *Upshur v. Briscoe*, 138 U. S., 365, 11 Sup. Ct., 313, 34 L. Ed., 931; Loveland, Bankr. § 295). In view of these decisions, we regard the addition of the word 'misappropriation,' inserted in subdivision 4 of section 17 of the act of 1898, which was not in the former act, as quite significant, and as designed to except from the discharge the classes of debts last referred to which were discharged under the former bankruptcy law. It will also be observed that the word 'public,' qualifying 'officer,' in the former statute, has been omitted from the act of 1898.

"It seems to be the view of the text writers and of the Federal judges, so far as this question has been considered, that Congress in this change of phraseology intended no change whatever with reference to the character of the debts created by fraud, which are not dischargeable (Coll. Bankr. (3d ed.), pp. 198, 199; Loveland, Bankr., §§ 293, 295; *In re* Thomas, 1 Am. Bankr. R., 515, 92 Fed., 912; *In re* Moreau Lieber, 3 Am. Bankr. R., 217. If the words 'fraud,' 'embezzlement,' and 'misappropriation' are all qualified by the clause, 'while acting as an officer or in any fiduciary capacity,' it is difficult to see the purpose of the use of the word 'fraud' at all.

"The respondent's claim not having been merged in a judgment, subdivision 2 of section 17, hereinbefore quoted, has no application, and we do not think that that subdivision tends to sustain the appellant's contention. It will be observed that there was no corresponding provision under the former law expressly exempting from the discharge causes of action for fraud that had merged in judgments. There appears to have been some doubt whether such judgments would remain enforceable, and, in view of the fact

that Congress provides in subdivisions 1 and 5 of section 63 for proving judgments as debts, this subdivision was doubtless enacted to obviate such question, as well as to provide for cases, as has been seen, that were neither covered by the former law nor included in subdivision 4 of the present act. *In re* Lewensohn, 3 Am. Bankr. R., 594–596, 99 Fed., 73; Coll. Bankr. (3d ed.), p. 194.

"The application of subdivision 4, relating to debts not in judgments, depends on how the debts were created; while the application of subdivision 2, which is confined to debts merged in judgments, depends, not on how the debts were originally created but on the form of action on which the recovery was had, as shown by the judgments, pleadings, and record. *In re* Rhutassel (D. C.), 96 Fed., 597; *In re* Thomas, 1 Am. Bankr. R., 515, 92 Fed., 912; *Burnham v. Pidcock*, 58 App. Div., 273, 68 N. Y. Supp., 1007; *In re* Bullis, *supra*; Coll. Bankr. (3d ed.), p. 194. We are of the opinion, therefore, that this indebtedness, having been created by the fraud of the appellant, was not discharged by the decree in bankruptcy."

An appeal was taken by permission from the judgment of the appellate division to the court of appeals (Frey *vs.* Torrey, 175 N. Y., 501; 67 N. E. Rep., 1082; court of appeals of New York June 9, 1903):

"Appeal by permission from a judgment of the appellate division of the supreme court in the first judicial department entered March 22, 1902, which affirmed a determination of the appellate term affirming a judgment of the municipal court of the city of New York in favor of plaintiff * * *

"Second question certified: Under subdivision 4 of section 17 of said act, does a discharge in bankruptcy under said act release the bankrupt from a debt which was created by his fraud, *but not while acting as an officer or in any fiduciary capacity*, where such debt has not been reduced to, or merged in a judgment? *Per curiam:* Judgment (70 App. Div., 175; N. Y. Supp., 40) affirmed with costs, on prevailing opinion below. Both questions certified answered in the negative. Parker, C. J., and Gray, O'Brien, Bartlett, Haight, Martin, and Vann, JJ., concur."

In *Stevens vs. Meyers* (supreme court, appellate division, May 16, 1902), 76 N. Y. Supplement, 332, the plaintiff brought suit to recover the value of goods procured by the defendants with intent to cheat and defraud the plaintiffs. Ingraham, J., delivering the opinion of the court, said:

"In this case when the action came on for trial, plaintiff had a cause of action based on fraud which, if established, would not have been affected by the discharge."

Pridmore *vs.* Torrey, 77 N. Y. Supp., 86 (May, 1902), was an action for fraud. Defendant pleaded his discharge in bankruptcy as a bar to the action. Judge Gildersleeve, delivering the opinion of the court, said:

"The discharge in bankruptcy could not relieve the defendant from a debt *founded on fraud*, even though such debt was included in the schedules, and defendant cannot claim exemption on that ground from the debt on which the plaintiff seeks to recover in this action. See bankr. act, sec. 17, subdivision 4; Frey *v.* Torrey, *supra*."

In re Wollock, 120 Fed. R., 516; 9 Am. B. Rep., 685 (district court, N. D. Illinois, January, 1903), was an application to stay a suit in tort pending in the State court. The opinion delivered by the district judge, Kohlsaat, is as follows:

"This matter comes on to be heard on motion of the bankrupt to restrain prosecution of a suit in tort brought by Crump Bros. against the bankrupt pending his discharge. The suit was instituted subsequently to the filing of the petition herein. The declaration counts upon fraud of defendant therein (bankrupt herein) in securing credit upon goods purchased. The State court has advanced the cause to a speedy hearing, on the representation of plaintiff therein that the claim will be released by a discharge in bankruptcy unless reduced to a judgment prior to discharge. The bankruptcy matter stands now on objections to discharge. If it is true, as contended, that the Crumps will be barred from pressing their suit for fraud unless the same is reduced to judgment before discharge, manifestly they should be per-

mitted to proceed to judgment at once. On the other hand, if the claim would not be released by a discharge of the bankrupt in bankruptcy, then there are many reasons why the action in the State court should be restrained pending such discharge, among which may be named: First, that the bankrupt should be placed in a position to plead such discharge; second, it is peculiarly the province of the court having jurisdiction of the suit for recovery on the ground of fraud to pass upon the question as to whether the claim is one that is barred by a discharge under the statute, or not; third, if it shall become general practice to cast upon the district court, in bankruptcy proceedings, the duty of determining the character of claims presented, the work of administrating the bankrupt estates will become unconscionably prolix and burdensome.

"The question raised involves a construction of section 17 of the bankruptcy act [U. S. Comp. St. 1901, p. 3428]. Clause 2 of this section, by its terms, seems to limit the exception to judgments in actions for fraud, or by obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another. A common-sense reading of this clause is to the effect that nothing short of a judgment obtained in the cases specified will serve to take a case out of the general rule, and release it from the effect of a discharge; but this clause must be read in connection with clause 4 of section 17, which is as follows, viz.:

"A discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity."

"The result of the State court proceeding can have no effect upon the bankrupt's right to a discharge. He is entitled to a discharge, in a proper case, notwithstanding some claims against him are found to be based upon fraud, and the question for the court having jurisdiction of a given case is simply whether that claim is released by the discharge. Nor can the character of a claim be affected by any steps taken subsequent to the filing of the petition. The rights of the parties must be adjusted as of the time of filing the petition in bankruptcy. It is inconceivable that the Congress intended to enact by section 17 that no claim, however tainted by fraud, even to the extent of theft or robbery, should be

excepted from the effect of a discharge in bankruptcy, unless reduced to the form of a judgment. From the reading of the act, it is evident that no such idea was contemplated. In my judgment, a fair interpretation of section 17, in the light of the previous act and the spirit of the law, leaves no doubt but that fraud in a claim, as well as a judgment based upon a fraudulent claim, is sufficient to bring the claim within the exceptions of the statute. This view is supported by many authorities. *In re* Blumberg (D. C.) 94 Fed. 476; *In re* Thomas (D. C.) 92 Fed. 912; *In re* Lewensohn (D. C.) 99 Fed. 73; *In re* Steed (D. C.) 107 Fed. 682; Loveland, Bankr. §§ 293, 295; Lowell, Bankr. 488; Collier, Bankr. (3d ed.) 200, 202; Bracken *v.* Milner (C. C.) 104 Fed. 522 (Neighbor's transaction); Frey *v.* Torrey (Sup.) 73 N. Y. Supp. 201; *Id.*, 75 N. Y. Supp. 40; Stevens *v.* Meyers (Sup.) 76 N. Y. Supp. 332.

"There is nothing in the point made by counsel that the court is without power to stay a proceeding begun after the filing of the petition in bankruptcy. The argument reduces itself to an absurdity. Section 11 of the act of 1898 [U. S. Comp. St. 1901, p. 3426] provides that the court shall stay a suit which is founded upon a claim from which a discharge would be a release, etc.; the plain object of the section being to bring all matters affecting provable claims into the district court. Section 11 provides that nothing in that section shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not therein enumerated. Clause 15, § 2 [U. S. Comp. St. 1901, p. 3420], provides that the court has such jurisdiction at law and in equity as will enable it to 'make such orders, issue such process and enter such judgments in addition to those specifically provided for, as may be necessary for the enforcement of this act.' It will be seen that the court is required to stay only provable claims, by the statute. This would not limit its power to provable claims in a case, the prosecution of which would interfere with the proper enforcement of the act. It is admitted by the petition presented herein for a restraining order that the action sought to be stayed is an action on the case for fraud. If tried, the verdict must be 'Guilty' or 'Not guilty.' Fraud is the gist of the action. Unless fraud is proven, there can be no recovery. The judgment of the court will be conclusive as to the existence or absence of fraud. Manifestly,

under the holding above set out, the court is entirely without jurisdiction to stay the proceeding, under the language of the statute; and where, as in this case, there is nothing but the question of fraud involved, to which a discharge cannot be pleaded, there can be no embarrassment to the administration of the bankruptcy cause by this court,—consequently no case made for the general powers of this court.

"The petition to stay suit is denied."

In Watertown Carriage Co. *vs.* Hall, 68 Fed. R., 629 (court of appeals of New York, Oct. 30, 1903), the complaint alleged that the plaintiff was the owner and entitled to the immediate possession of the sum of $65, consisting of bank bills, etc.; that on a day named the defendant did fraudulently and unlawfully convert, misappropriate, and embezzle said sum of money; that before the commencement of the action the plaintiff demanded the said sum of money of the defendant, but that the defendant refused to deliver the same to the plaintiff; and that the plaintiff was damaged in the sum of $65, with interest from the day of said conversion, misappropriation, and embezzlement. The defendant interposed, as a defense to the cause of action and as a bar to the same, his discharge in bankruptcy. To this defense the plaintiff demurred, on the ground that it was insufficient in law upon the face thereof. The demurrer was sustained in the lower courts.

O'Brien, J., delivering the opinion of the court of appeals, said:

"The only question, therefore, presented by this appeal is whether a discharge in bankruptcy is a good defense to a cause of action such as is stated in the complaint herein. * * * In other words, does the defendant's discharge in bankruptcy protect him in this action from liability resulting from his act in 'fraudulently and unlawfully converting, misappropriating and embezzling,' the $65 of the plaintiff's money? The answer to that question is to be found in the plain language of the present bankrupt law enacted in 1898, act July 1, 1898, c. 541, sec. 17, 30 Stat., 550 [U. S. Comp. St., 1901, p. 3428], as follows: * * * 'The cause of action

stated in the complaint is plainly excepted from the operation of the discharge as a release of the defendant from liability.' It does release him from certain debts and obligations, but not from liability for the cause of action stated in the complaint, and hence the answer setting up the discharge as a defense was open to demurrer, and so it has been held since the enactment of the present bankrupt law. Frey *v.* Torrey, 70 App. Div., 166; 75 N. Y. Supp., 40, affirmed on opinion below, 175 N. Y., 501; 67 N. E., 1082; **Crawford v. Burke,** 201 Ill., 581; 66 N. E., 833. These views sufficiently answer the question certified as we have construed it."

Let us now look at the cases cited by counsel for plaintiffs in error in support of their views on the question under consideration. They cite: *In re* Rhutassel, 96 Fed. R., 599 (district court Iowa, Sept., 1899); *In re* Hirschman, 104 Fed. R., 69 (district court Utah, Oct., 1900); *In re* Lewensohn, 99 Fed. R., 74 (district court, S. D. N. Y., January, 1900); Hargadine McKittrick Dry Goods Co. *vs.* Hudson, 111 Fed. R., 361 (circuit court, E. D. Mo., Oct., 1901); Morse & Rogers *vs.* Kauffman, 40 S. E. Rep., 916 (supreme court, Va., March, 1902); Gee *vs.* Gee, 87 N. W. Rep., 1116 (supreme court Minn., Nov., 1901); *In re* Bullis, 73 N. Y Supp., 1048 (supreme court, N. Y., App. Div., Jan. 7, 1902); Harrington *et al. vs.* Herman, 72 S. W. Rep., 546 (supreme court Mo., division No. 2, Feb., 1903), and Crosby *vs.* Miller (55 Atl. Rep., 328; 25 R. I., 172).

Counsel say (Brief, 67):

"The decisions of the Federal courts support our views of this question."

If a "decision" imports a judicial determination of a question which is involved in the suit, then we say, counsel have not cited *a single "decision" of a Federal court which "supports their views."* The reason why they have not is simple. There were none to cite. We say this, after having made a thor-

ough examination of the Federal decisions rendered since the passage of the bankruptcy act of 1898 to the present time. Counsel cite two Federal cases (*In re* Rhutassel, *supra*, and *In re* Hirschman, *supra*) in which the dicta therein favor their construction; and they cite only one case decided in the State courts (Morse *vs.* Kauffman, *supra*) which supports their views, and in which the determination of the question we are now considering was necessary to the decision.

In re Rhutassel, supra:

In this case the bankrupt filed his petition for a discharge. A creditor who had obtained a judgment on a promissory note objected to the granting of a discharge on the ground that the debt on which he had obtained his judgment was created by false pretenses and fraudulent representations on the part of the debtor. The learned judge, after deciding that the only question before him was as to the right of the bankrupt to a discharge, and that the effect of a discharge could not be considered in the case then pending before him, proceeded, unnecessarily, to give his views as to the proper construction of section 17. It is quite evident that he expressed his views without much thought or consideration. He said:

"If it had been enacted that a discharge should not bar claims or debts created by false pretenses or false statements, such a provision would have been a fruitful source of litigation in the future, and would have subjected the bankrupt to *constant worry and pressure* from creditors, claiming that the debts due them had in fact been created by false statements with respect to the financial condition of the debtor, and were, therefore, not within the bar of a discharge; and hence, the *wisdom* of the provision that limits the exception to judgments which show on their face that the claim merged therein was based on the fraud of the bankrupt."

It is, perhaps, not to be wondered at, that the learned judge construed the statute as he did, when we consider the reasons

which he thought had influenced Congress to make a discharge in bankruptcy a bar to claims created by fraud or by false and fraudulent representations. Congress, he thought, had so much regard for the bankrupt, whether honest or dishonest, that it would not permit his tranquillity or peace of mind to be disturbed by subjecting him to "CONSTANT WORRY AND PRESSURE" from creditors claiming that the debts due them *had, in fact, been created by false and fraudulent statements as to his financial condition.*

That the learned judge did not feel quite sure that the reasons which he gave for his construction of subdivision 4 were correct, becomes quite apparent when he returns to the only question properly before him, and decides it in accordance with his construction of *subdivision 2.* He says:

"But *whatever the reason* for the enactment may have been, the fact remains that the second clause of section 17 embraces only *judgments* for frauds, or for obtaining property by false pretenses or statements or for willful injuries to person or property, and cannot be extended to include claims *not in judgment*, or judgments based on the contract, express or implied, of the bankrupt, and not upon a fraud or wrong of the nature of those described in the clause in question."

In re Hirschman, supra:

This was a case, as stated by the court, where—

"Several parties have applied to the court to direct the manner of liquidation of their claims against the bankrupt, under section 63, sub. sec. '*b*' of the bankrupt act of 1898." * * * "For the petitioners it is contended that section 63, sub. sec. '*b*' of the bankrupt act of 1898, authorizes the liquidation and subsequent proof of claims *ex delicto.*"

The only question involved in that case was as to the proper construction of section 63, and as to whether the petitioning creditors had a right, under that section, to have their claims liquidated and proved. It is evident that what Judge Marshall said about a "cause of action for a tort not

reduced to judgment" was said with reference to *subdivision 2*, and not with reference to *subdivision 4* of section 17. He did not undertake to give a construction to subdivision 4. Whatever he did say, with reference to section 17, was simply *dictum*, as no question involving a construction of any part of that section was before him.

In re Lewensohn, supra:

This case is adverse to counsel's contention. It was an application of the bankrupt for a stay of proceedings on the warrants which had been issued for his arrest. He did not ask to have the *suit* stayed, because, as Judge Brown expressly held, *the suit was founded upon a claim* (obtaining goods by means of false representations) *from which a discharge would not be a release.* The bankrupt sought exemption from arrest under general orders 12 and 30, and under section 9*a*, subdivision 2. Counsel seek to give the impression that the protection from arrest, which was given on condition that the bankrupt give bond, was granted on the ground that the suit was founded "*upon a claim from which a discharge in bankruptcy would be a release.* If it was not the intention of counsel to convey such an impression, then their object in citing the case is not apparent.

Hargadine McKillrick Dry Goods Co. vs. Hudson, supra:

This was an action of debt on a judgment rendered in a State court in Texas. "The judgment sued on was obtained upon promissory notes and was not in an action for fraud." Defendant pleaded his discharge in bankruptcy. Plaintiff replied "that the debt which was the foundation of the judgment sued on in this case was created by the fraud of the defendant." The court said:

"The real question involved in this case is whether or not the discharge in bankruptcy operated as a release of the defendant from the *judgment* sued on."

With the exception of the question of *res adjudicata*, all that was involved and decided in that case is stated in the syllabus (1), which is as follows:

"A *judgment* rendered on promissory notes cannot be brought within bankr. act 1898 sec. 17*a* cl. 2 excepting from the provable debts released by a discharge, debts which 'are judgments in actions for frauds,' by evidence that the debt was fraudulent in its inception; *the creditor being conclusively bound by his election to waive the fraud and sue on the contract.*"

Morse & Rogers vs. Kauffman, supra:

This is the only case cited by counsel and in which the construction of subdivision 4 of section 17 was necessary to the decision and which supports their contention. The case appears to have been but superficially considered. We submit that it can have but little weight as an authority, in view of the reasons given and the authorities cited in support of the court's construction of the statute. The court said that in the *Rhutassel* case the same "construction was placed upon the enactment * * * in a *well-considered opinion.*" The "well-considered opinion," so far as it related to the construction of subdivision 4, was merely the dictum of Judge Shiras. The court quoted the note appended to the report of the Rhutassel case by the editor of the Am. B. R. We have shown by quotations from the 3d edition of Collier on Bankruptcy, published after the Rhutassel case was reported, that Mr. Collier's views were directly the opposite of those expressed in the note referred to. The court cited the Lewensohn case and Bracken *vs.* Milner. Both cases, as we have pointed out, are adverse to the construction given by the Virginia court. The court also cited the Bullis case, to which we will refer later on.

Gee vs. Gee, supra:

In that case suit was brought by plaintiff upon a *judgment* obtained by him against his partner in an action for an accounting. Defendant answered, setting up his discharge in bankruptcy, as a defense to the action.

"Plaintiff, by reply, alleged that the judgment referred to was for the defendant's fraud and misappropriation *while acting in a fiduciary capacity.*"

The court said:

"Under plaintiff's contention the disposition of this appeal is within a very narrow compass depending upon the construction of that portion of the Federal bankruptcy act of 1898, which excepts from the discharge judgments in actions for fraud * * * or debts created by fraud * * * in any fiduciary capacity * * *. But it is unnecessary in this case to anticipate a decision of the Supreme Court of the United States in that respect, for the judge, *not having before it a judgment for fraud*, fully considered the weight of evidence on that question, and found *that there was no fraud*, upon testimony that amply supports his conclusions in that respect and *forecloses any further inquiry upon that issue* here, leaving for us the simple duty of construing the meaning of the provision that excepts '*fraud in a fiduciary capacity*' from the operation of the bankruptcy discharge."

It will be noticed that the plaintiff limited himself to two questions: (1) Was the debt upon which the judgment was founded created by fraud? (2) Was the fraud committed by the defendant *while he was acting in a fiduciary capacity?* Upon those issues alone the case was tried. Both issues were found against the plaintiff. The case is not in point. The question whether a discharge in bankruptcy can be interposed as a shield against positive fraud committed by the bankrupt while he was *not acting in a fiduciary capacity* within the meaning of the bankruptcy act, was not involved in the case.

In re Bullis, supra:

This was an application of the bankrupt for the discharge of judgments that had been rendered against him. The judgment creditor contested the application on the ground that the judgments were recovered by reason of the bankrupt's fraud. It was held that the judgment was rendered in an action for fraud, and that the bankrupt was not released. The decision was based on the provisions of *subdivision 2 of section 17*. What Justice Springer said as to the construction of subdivision 4 was dictum, and cannot be reconciled with the following statement made by him in the course of the opinion:

"*One exception that has pervaded all of our bankrupt laws is, that where the insolvent has become liable for the payment of a debt which had its origin in his own positive dishonesty, the way is not open for his discharge from that liability.*"

In *Frey vs. Torrey*, 75 N. Y. Supp., 40, Justice Laughlin, referring to the Bullis case, said:

"The view presented by appellant seems to have been adopted by the appellate division in the fourth department *In re* Bullis (73 N. Y. Supp., 1047), but the construction of subdivision 4 was not essential to the decision in that case. The question there was whether a judgment had been discharged by a discharge in bankruptcy of the judgment debtor, and the point decided was that the judgment had been recovered in an action for fraud, and therefore was excepted from the operation of such discharge by subdivision 2 of said section 17."

Harrington & Goodman vs. Harman, supra:

This was a proceeding to revive a *judgment* founded upon an account for merchandise sold by plaintiffs to defendant. Defendant pleaded his discharge in bankruptcy. Plaintiffs replied that the debt evidenced by the judgment was created by fraud. In the course of the opinion, the court said:

"It is, however, insisted by plaintiffs that they have the right to go beyond the record in this case and show that the creation of the debt upon which the judgment is based was by fraud and false representation. *This we do not think plaintiffs have the right to do under the provisions of the bankrupt law in force at the time of the entry of the discharge of the defendant in the bankruptcy proceedings.* * * * The form of the action must be determined by the petition; hence the affidavit for an attachment in aid of the suit forms no part of the petition, and cannot be looked to in determining the form of the action."

The court decided the case on the ground that the record showed that "the judgment sought to be restrained was based upon an ordinary suit—on account for goods sold and delivered" and that the plaintiffs did not have "the right to go beyond the record in the case and show that the creation of the debt upon which the judgment was based was by fraud and false representations." What the court said on other questions was wholly unnecessary to the decision of the case.

Ousley vs. Miller, Vaughn & Co., supra:

This was a petition for stay of execution issued on a judgment rendered in an action of trover and conversion. The question was whether an action of trover and conversion was an action for fraud. The court held that it was not and that, therefore, the judgment was barred by the defendant's discharge in bankruptcy. That was all that was decided in the case.

Opposing counsel say:

"It must be remembered, however, that bankrupt laws always work ruthless destruction of creditors' rights and remedies. *Such laws are never passed in the interest of the creditor class, but wholly in the interest of the debtor class*" (Brief, 74).

The history of bankruptcy legislation shows that no such law was ever enacted, either in this country or in England. It has been repeatedly declared by the highest courts of both countries that bankrupt laws are enacted with the object and intention of relieving *honest* men, but not *rascals*, from the burden of their debts.

Counsel have wholly misconceived the purpose and intention of Congress in framing and passing the bankruptcy act. This accounts to some extent, at least, for their misconstruction of it.

The bankruptcy bill passed by Congress in 1898 was reported to both houses by a conference committee. Mr. Henderson, ex-Speaker of the House, was chairman of the Judiciary Committee, and was also a member of the conference committee that reported the bill. In presenting the report he said that the bill "will thoroughly protect *honest men* in preserving their rights against *dishonest debtors*."

Mr. Ray, of New York, a member of the Judiciary Committee of the House, and also a member of the conference committee that reported the bill, said:

"It is absolutely essential that we guard against *frauds*, and so frame our law that *dishonest men shall not have the benefits of it.* * * * When men begin to *cheat* or *defraud*, or give preferences, and are insolvent, it is time that proceedings are taken *to protect all creditors.* * * * The gentleman says that the commercial honor and integrity of the nation and of its people should be maintained. I agree with the gentleman in that statement. *The maintenance of commercial honor and integrity is just what this bill seeks to secure, and the law asks nothing and seeks nothing beyond that. The person who has maintained and who maintains his commercial honor and integrity, will be unharmed by the severest and most drastic measure found in this bill.* * * *

"If there is anything in this bill that is a terror to an honest man, I regret that the provision is found in the bill. I know no such provision can be found. If on the other hand there is one or more provisions in this bill *that is a terror to the dishonest man*, I rejoice that I have had a hand in framing the provision. No man who cares for the busi-

ness and commercial interests of this country, or who cares for the prosperity of this people, desires to have it possible *for the debtor to cheat his creditor*, or have a creditor oppress his honest debtor. *We have made it impossible for either of these things to occur.* * * *

"No just claim can be made that an *honest* man will suffer under these provisions. They are just, necessary, and in the interest of *debtors and creditors alike*" (Congressional Record, House, June 28, 1898).

The bill, as presented by the conference committee, was passed without amendment.

In the case of *In re Silverman*, 22 Fed. Cases, 135, 139, Judge Deady said:

"It (the bankrupt law) is remedial, and seeks to protect the honest creditor *from being overreached and defrauded by the unscrupulous.* It is intended to relieve the *honest*, but unfortunate, debtor from the burden of liabilities which he cannot discharge, and allow him to commence the business of life anew."

In the case of *In re Dow's Estate*, 105 Fed. Rep., 889, 890 (dist. court, Iowa, Dec., 1900), Judge McPherson said:

"*The law for proceedings in 'voluntary' bankruptcy does not exist for rascals. A dishonest debtor has no standing in such proceedings.*"

In the case of *In re Becker*, 106 Fed. Rep., 54, 56 (dist. court, N. Y., January, 1901), Judge Coxe said:

"A discharge is intended to relieve misfortune, *but it must be misfortune coupled with absolute honesty.*"

In the case of *Turner vs. Turner* (district court, D. Indiana, May 20, 1901), 108 Fed. Rep., 785, 788, Judge Baker says:

"The object of the bankrupt act (1898) was to release the honest and unfortunate debtor from the burden of his debts. * * * The change in the language of the present statute from that employed in the former statutes does not neces-

sarily require a change of construction. The difference of language ought to be so clear and distinct as to evince a manifest intention to change the law so that the interpretation given to former statutes relating to the same subject-matter should be clearly inapplicable in the construction of the latter statute."

In *Lubke vs. Thomas*, 116 U. S., 606, 607, Mr. Justice Miller, speaking for the court, said:

"It is the essence of the bankrupt law that when the bankrupt has complied with all the conditions of the statute and surrendered his property, he should be released from all debts *except those of a fiduciary character or founded in fraud.*"

In the case of *In re Scott*, 126 Fed. Rep., 981 (dist. court, Del., Jan., 1904), Judge Bradford, speaking of the bankruptcy act, said:

"It was designed to relieve unfortunate but *honest* debtors and to secure a proper distribution of their assets among their creditors."

In *McDonald vs. Brown*, 10 Am. B. R., 58 (supreme court R. I., Feb. 3, 1903), the court said:

"The policy of the bankrupt law is not to relieve an insolvent debtor from liabilities arising out of his fraud, or other wrongdoing, but to relieve him from his debts and obligations which were *honestly* contracted and incurred, but which, because of misfortune of some sort, he has become unable to meet. To hold otherwise, as it seems to us, would be to make the law an instrument of wrong and oppression."

The court quoted with approval the following from *Disler vs. McCauley*, 71 N. Y. Supp., 949:

"The purpose of the bankrupt law was to relieve failing *honest* debtors from their money obligations, and not free tortuous debtors from liabilities for their wrongs. * * * The *spirit of the bankrupt law is to govern.*"

In the recent case of *Tinker vs. Colwell* (not yet reported) this court, speaking of discharges under section 17, said:

"It was an *honest debtor*, and not a malicious wrongdoer that was to be discharged."

Opposing counsel impute to Congress the intention of passing a law to relieve the *swindler*, the *embezzler*, and the *thief* from all pecuniary liability, as well as the honest but unfortunate man, from the burden of his debts.

Within five months after the defendants commenced business they were hopelessly *insolvent*, which fact they well knew, but kept carefully concealed; yet, with liabilities constantly increasing, and assets constantly diminishing, they kept right on in business, and held themselves out to the public as solvent and worthy of confidence, and continued to demand, receive, and fraudulently appropriate to their own use, the money and securities of their customers until May 20, 1895, when they went into court, and asked that a receiver be appointed to take possession of and distribute among the victims of their fraud what little remained. It is a matter of common knowledge that men have been compelled to wear stripes for conduct less reprehensible.

VIII.

As to the assignment of error that the court erred "in refusing to admit proper and competent evidence offered by the defendants in the circuit court."

Plaintiffs in error have not complied with the rule of this court which provides that, "When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected."

Counsel have evidently thought it would be better not to

comply with the rule, but claim, in general terms, that the court "refused to allow us (them) to prove that the debt was not fraudulently contracted."

By referring to the record, it will be seen that counsel offered to prove:

1. That in October or November, 1894, the defendant Crawford told the plaintiff that at that time he (Crawford) had sold Metropolitan Traction "short" at Philadelphia (Rec., 231).

2. That "up to very near the time of the failure" the defendants "regarded" the accounts which had been "put in as worthless," as "valuable assets of the firm" (Rec., 233).

Counsel said, "*If* we offer to prove," etc. That won't do. It has been repeatedly held that an offer to prove is insufficient. The witness must be called and questioned on the stand. The record shows that neither of the defendants was on the stand when counsel asked the court, "*If* we offer to prove," etc. It appears from the record that all objections to the evidence offered were withdrawn, and that counsel had the opportunity to introduce it if they saw fit to do so.

Mr. Justice Carter, delivering the opinion of the Supreme Court, in this case, said:

"In the first place, after the court had sustained plaintiff's objection to the testimony of the defendants as to their good or bad faith in the transactions complained of, the plaintiff withdrew, in open court, his objections to such testimony, and stated that the same might be admitted without objection, but the defendants declined to avail themselves of such withdrawal and refused to call any witness, and it is evident from the record that they preferred to save their exception for appeal, rather than to have the defendants heard as witnesses in the case. We must hold that appellants waived the alleged error of which they are now complaining."

Counsel claim that their plea *puis darrein continuance* and the replication thereto "presented distinct *issues of fact* to be tried and determined upon the evidence." The plea and the replication thereto presented no "*issues of fact.*" They presented issues of law only. The replication did not deny the allegation that the defendants had received their certificates of discharge in bankruptcy, but it did deny the averments in the plea that the plaintiff's claims were provable, or that they were barred by the defendants' discharge. As was said by this court in Tinker *vs.* Colwell, *supra*, the averments in the plea were mere conclusions of law, and not averments of fact.

It is true that the conclusions of law, averred in the pleas, were sworn to by the defendants, Crawford and Valentine, but we hardly think that their oaths, as to what the law was, will settle the legal question for this court. In the case of *In re* Wooten, 118 Fed. Rep., 670, the court said:

"No layman, and few lawyers, would be willing to make oath to a legal objection or proposition. Though confident of their opinion, all would hesitate to support it under oath."

Evidently, the judge had never held court in Chicago.

Counsel say that the doctrine of *Mount vs. Sholes* is "an antiquated feature of the machinery of practice." In the lower courts they said it was "a harsh, antiquated and extremely technical rule." Undoubtedly their clients also think that the *eighth commandment* is a "harsh and antiquated rule." Whatever may be their opinion of that rule they evidently treated it as *obsolete.*

IX.

The Gambling Question.

Like the "ill bird that fouls its own nest," Crawford and Valentine now say that they were *gamblers, keepers of a "bucket-shop"* and *violators of the criminal statutes of their own State;* and that the transactions between themselves and the defendant in error, were conducted on a gambling basis, and, therefore, were illegal and void; and that no recovery can be had. This is their last resort, after their unsuccessful efforts, thus far, to escape the payment of the damages resulting from the gross frauds of which they stand convicted.

If there was any foundation for the charge that defendant in error was "speculating in market differences," in the stock in controversy, why was not that charge made in the trial court, where he could have introduced evidence bearing especially on that question? As was said by the supreme court of Illinois, in its opinion in this case:

"The record gives no hint, by pleading, evidence, or propositions of law, that this question was raised or sought to be raised in the trial court."

Was it the scheme of counsel for Crawford and Valentine to lead the defendant in error to think that they never thought of raising such a point, and thereby to induce him to believe that there was not the slightest necessity for him to produce evidence which would be especially applicable upon that question? Or was the gambling question an *afterthought* with them? It certainly was one or the other.

The following is quoted at page 114 of counsel's brief:

"*All contracts for the purchase or sale of property* with the understanding or agreement of the parties (whether that agreement is expressed on the face of the contract or exists

by secret understanding) that the property is not to be delivered or accepted, but the contract satisfied by an adjustment of the differences between the *contract* and *market prices*, are mere wagers, or gambling contracts, and void.

Schneider *v.* Turner, 130 Ill. 39."

Counsel for plaintiffs in error endeavor to make it appear that the law, as stated in *Schneider vs. Turner*, applies to the case at bar.

There is not a word of evidence in the record to show that the "*contracts for the purchase or sale*" of the Metropolitan Traction stock, in controversy, were made "with the understanding or agreement," secret or otherwise, between the parties to this suit, that the stock was "not to be delivered or accepted, but the contract satisfied by an adjustment of the differences between the *contract* and *market prices*."

Not once, have opposing counsel referred to a page of the record, where their repeated assertions, that the "defendant in error was speculating in market differences," are substantiated. Do counsel imagine that this court will attach any importance to their assertions unless they show by the record that what they assert is true?

"Market differences," as shown by the authorities which counsel have cited, are "the differences between the *contract* and *market prices*." Dealing in "differences" means that, *at the time a purchase or sale is made*, there is an agreement or understanding between the purchaser or seller, with the other contracting party, that the property bought or sold shall not be received or delivered, but that the transaction shall be adjusted by the receipt or payment of the difference between *the price at which the property was bought or sold, and the market price at the time the contract is closed.*

First, as to the 450 shares of Metropolitan Traction stock mentioned in the third count of the declaration, and which was purchased by *Valentine & McAvoy* for the defendant in error (Rec., 10).

There was no contract between the defendant in error and

Crawford & Valentine for the purchase of the 450 shares of stock mentioned. Consequently, there could have been no "understanding or agreement" whatever between the defendant in error and *Crawford & Valentine*, at the time the contract for purchase was made, as to the acceptance or delivery of the stock; or as to the "adjustment of differences;" or as to anything else. Crawford & Valentine did not commence business until long after the 450 shares had been purchased. Their connection with the stock commenced on the 30th day of June, or the first day of July, 1894, when the defendant in error caused the 450 shares of Metropolitan Traction stock, and 100 shares of Chesapeake and Ohio stock, to be transferred to them, and put under their control as his brokers and agents, and as collateral security for the amount which he owed Valentine & McAvoy on the stock, and which indebtedness Crawford & Valentine assumed and agreed to pay. It is not pretended that there was anything illegal in that transaction. That transaction was not a "*contract for the purchase or sale of property.*" It would not have been illegal for the defendant in error, and Crawford and Valentine, to have agreed, at the time of the transfer, that the stock should be sold the next day, and that the proceeds of the sale, less the balance which he owed on the stock, should be paid to him. There could have been no "adjustment of differences" between the *price at which the stock was bought* and the *market price on the day of sale*, because Crawford & Valentine *did not make the purchase*, was not a party to the *purchase contract*, and had *no interest whatever in what the stock originally cost.* It did not concern them. Their contract with defendant in error was, that they would assume and pay the amount which he owed Valentine & McAvoy on the stock, and take the stock as collateral security, and hold it for him, as his brokers, agents and pledgees, and subject to his orders, until he satisfied their claim against him. The transactions between the defend-

ant in error and *Crawford & Valentine* were separate and distinct from his transactions with *Valentine & McAvoy*. The contract which Crawford & Valentine entered into with him and the duties and obligations which they assumed are set out in the declaration, and are entirely independent of the contract between him and *Valentine & McAvoy*, and under which the latter purchased, held, and carried the stock for him, as his brokers and agents. There is nothing to show that the contract or understanding between the defendant in error and Valentine & McAvoy, as to the purchase of the 450 shares, and its final disposition, was not perfectly legal. It is to be presumed that it was. As a matter of fact, if the gambling question had been raised in the trial court, there would have been no difficulty for the defendant in error to have shown that the stock which was transferred by Valentine & McAvoy to the plaintiffs in error had been purchased by the defendant in error *as an investment*, and *with the distinct understanding* that the stock should be held and carried by Valentine & McAvoy until the defendant in error could make arrangements to have it taken up and paid for.

Second, as to the 300 shares of Metropolitan Traction stock delivered to the plaintiffs in error on the 29th of January, 1895, as mentioned in the fifth count of the declaration (Rec., 14).

Bankrupt and desperate, Crawford & Valentine conceived the scheme of getting into their hands 300 shares more of the Metropolitan Traction stock, belonging to the defendant in error, and of fraudulently appropriating the same to their own use, as they had done with the rest of his stock. On January 29, 1895, after having obtained from him $1,000, as part payment on Metropolitan Traction stock which they falsely and fraudulently represented to the defendant in error that they were then holding and carrying for him, but

which they had, in fact, previously sold without his knowledge, and without rendering him any account of the sales, Crawford & Valentine solicited him to turn over to them 300 shares of Metropolitan Traction stock which he then had in the hands of Jamieson & Co., and offered to advance $24,000 on the 300 shares, and hold and carry the stock for him, as his brokers and agents—the market value of the 300 shares at that time being $27,600. Jamieson & Co. had purchased the stock through their correspondents, Huhn & Glendenning, at Philadelphia, in whose hands the stock was then held (Rec., 39, 40, 48). The defendant in error had purchased the 300 shares of stock, before the panic in 1893, for $42,000, and had paid $18,000 on the purchase, and would have taken the stock up and paid the balance due on it, had it not been for the panic. (Panics sometimes interfere with the best-laid plans.) So anxious were Crawford & Valentine to get the stock into their possession, or under their control, that they requested the defendant in error to go at once to Jamieson & Co.'s office and ask them to *telegraph* to Huhn & Glendenning to deliver the stock to Toland Bros. & Co., who were, at the time, one of Crawford & Valentine's correspondents, and who would receive the stock for them and advance thereon $24,000. The defendant in error did as Crawford & Valentine requested (Rec., 39, 40). Huhn & Glendenning delivered the stock to Toland Bros. & Co. and received from them $24,000, which was the balance then due on the stock, from the defendant in error. That transaction between the defendant in error and Crawford & Valentine was not a "*contract for the purchase or sale of property.*" They had nothing to do with the purchase of the property. They took it from the defendant in error, as collateral security, for a loan of $24,000, and under an agreement with him, to hold and carry the stock for him, as his brokers, agents, and pledgees, and subject to his orders, and to the payment of the amount advanced on it. It would have been just as legal

for the defendant in error to have, at any time, had Crawford & Valentine sell the 300 shares of stock, and, after deducting the amount of the loan, pay over to him the balance coming to him, as it would have been to have had the stock delivered to him on the payment of the loan.

The correspondence between Toland Bros. & Co. and Crawford & Valentine, on January 29, 1895, with reference to the transfer of the stock, is as follows (Rec., 157):

JAN'Y 29TH, 1895.

"Messrs. TOLAND BROS. & Co., *Phil'a* (Rec., 157).

"DEAR SIRS: We confirm instructions sent by wire today to receive from Messrs. Huhn and Glendenning 300 shares Metropolitan Traction stock and pay them $24,000 for our account.

"Very resp'f'y

"(Signed) CRAWFORD & VALENTINE,

"Per J. T. KILGOUR."

"JAN'Y 29TH, '95.

"Messrs. CRAWFORD & VALENTINE (Rec., 157):

"118 *La Salle St., Chicago, Ill.*

"DEAR SIRS: Confirming your telegram of today, we have paid Huhn & Glendenning $24,000, and have received from them 300 shares of Metropolitan Traction which we charge to your account.

"Yours truly

"(Signed) TOLAND BROS. & Co."

Four days after Crawford & Valentine got control of the 300 shares they drew a draft on Toland Bros. & Co. for $2,500 against the equity of the defendant in error in said 300 shares, which draft Toland Bros. & Co. paid and charged the same to Crawford & Valentine's account. The 300 shares of stock were then pledged to Toland Bros. & Co. for $2,500 more than the amount for which the stock had been pledged by defendant in error. On March 13, 1895, Crawford & Valentine sold, through Toland Bros. & Co., the 300

shares, without the knowledge or consent of defendant in error, and without rendering him any account of the sale, for the sum of $29,050, and fraudulently appropriated to their own use the entire reversionary interest of defendant in error in said stock. Not only that, but after the sale of the stock they represented to him that *the stock had not been sold, but that it was still in their hands and that they were still holding and carrying it for him.* Not satisfied with the $5,050, which was the difference between the amount loaned to defendant in error on the stock and the amount for which the stock was sold by Crawford & Valentine, they continued to demand and receive, from the defendant in error, further payments from him on the stock so sold, and interest on the stock also. But, as we said at the outset, it is a waste of time to discuss the question of fraud.

The fraud committed by Crawford and Valentine in their transactions with the defendant in error is shown in the record. As the question of fraud has been settled in the courts below, it is unnecessary to discuss it here. Our purpose is to show that the defendant in error was not "speculating with the plaintiffs in error in *differences between the contract and market price.*" Our statements with reference to the 450 shares of stock which defendant in error caused to be transferred from Valentine & McAvoy to Crawford & Valentine will apply, also, to the 300 shares of stock which he caused to be delivered to Toland Bros. & Co., at Crawford & Valentine's request.

Third. Crawford & Valentine purchased for the defendant in error, and on his order, only 100 shares of Metropolitan Traction stock—50 shares on September 28, 1894, and 50 shares on March 29, 1895.

They delivered to the defendant in error the following written notices of the purchases (Rec., 39):

"Crawford & Valentine, bankers & brokers,
"116 La Salle street.

"Chicago, September 29, 1856.

"J. E. Breed.

"Dear Sir: We have this day bought for your account and risk 50 shares Metropolitan Traction—price 110½.

"Respectfully yours,

"Crawford & Valentine."

Second notice with some heading:

"March 29, 1887.

"J. E. Breed.

"Dear Sir: We have this day bought for your account and risk 50 shares Metropolitan Traction—price 99.

"Respectfully yours

"Crawford & Valentine."

In stating the contract and understanding had between the parties to this suit, counsel for plaintiffs in error claim that their assertion that defendant in error was "speculating in differences" is untrue.

They admit (brief, p. 19) that plaintiffs in error were "under a contractual obligation to deliver to the defendant in error, at his demand, and on payment of $22,710.75, 250 shares of Metropolitan Traction stock." They admit that the plaintiffs in error "were, according to the undertaking which they had made with (defendant in error) on a good and valid consideration which he had carried out, under obligation to give him property worth, on the market, $7,262.25 more than he was obliged to pay them for it." Even if all the stock in controversy had been purchased by the plaintiffs in error for the defendant in error, are not the above admissions utterly inconsistent with the claim that there was any agreement, or mere understanding, between the parties to this suit that the stock was "not to be delivered or accepted, but the contract settled by an adjustment of the differences between the contract and market price?" If there was such an agreement, or understanding,

then plaintiffs in error were *not* under any "obligation to deliver to the defendant in error, at his demand, and on payment of $44,718.71, 550 shares of Metropolitan Traction stock." If there was such an agreement, or understanding, then they were *not*, "according to the undertaking which they had made with him *on a good and valid consideration* which he had carried out, under obligation to give him property worth, on the market $7,462.54 more than he was obliged to pay them for it."

They were under no obligation to deliver him any property whatever. They were under obligation to pay him differences, only.

Furthermore, the evidence shows that some time prior to April 1, 1895, the defendant in error tried to make arrangements through his friend, William Kent, to take the stock up and pay the plaintiffs in error the amount due on it (Rec., 193). It further appears from the evidence that about 9 o'clock, on the morning of May 20, 1895, the defendant in error, having heard that there was some trouble between Crawford and his partner, Valentine, over money matters (Rec., 162), went to their office and gave an order to have the stock forwarded from Philadelphia, so that it could be taken up and paid for (Rec., 50, 51), and that he did not know that the defendants had suspended payment until between 11 and 12 o'clock on that day (Rec., 52, 162).

We think that we have said enough on the gambling question. In fact, we think that we have said more than enough, and that we ought to apologize for so doing. We will say, however, in extenuation, that, in view of the fact that opposing counsel have devoted so much of their brief to misleading statements and misrepresentations on that question, we could not resist the temptation to say something in reply. The information which opposing counsel have imparted to the court, in their dissertation on stock brokers and their *usual methods and customs*, may not aid

this court very much in arriving at a correct conclusion on the Federal question before it, but it will probably serve the purpose of convincing their clients that they made no mistake in selecting their counsel.

We submit that the claims of defendant in error were not barred by the discharge of plaintiffs in error, in bankruptcy, and that the judgment should be affirmed.

JOHN E. BURKE,
In Person.